76-496

# Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

BENSON A. WOLMAN, *et al.*,

*Appellants,*

—v.—

MARTIN W. ESSEX, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

## JURISDICTIONAL STATEMENT

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No. _____

BENSON A. WOLMAN, et al.,

Appellants,

-vs-

MARTIN W. ESSEX, et al.,

Appellees.

On Appeal From The United States District Court
For The Southern District of Ohio
Eastern Division

# JURISDICTIONAL STATEMENT

Appellants, Benson A. Wolman, et al., appeal from the order of the United States District Court for the Southern District of Ohio, Eastern Division (hereinafter sometimes the "District Court") entered by a three-judge district court on July 21, 1976, upholding the constitutionality of Ohio Revised Code §3317.06 and denying to appellants (plaintiffs in the court below) a permanent injunction to restrain the

enforcement of that statute which provides various programs for the benefit of sectarian private schools. 1/ Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## Opinion Below

The order and opinion of the District Court are not reported. They are set out in the Appendix, infra, pp. A1-A33.

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1/ The following are the parties to this appeal: Appellants (Plaintiffs below who are citizens and taxpayers of Ohio and the United States) are Benson A. Wolman, Frederick Chambers, Patricia J. Keenan, Barbara Kaye Besser, Nancy R. Terjesen, and Marjorie Wright. Appellees who were defendants below are Martin W. Essex, Superintendent of Public Instruction of the State of Ohio, State Board of Education, Board of Education of the City School District of Columbus, Ohio, Gertrude W. Donahey, Treasurer of the State of Ohio and Thomas E. Ferguson, Auditor of the State of Ohio, as well as the following named parents and next friends of pupils enrolled in sectarian schools: James Grit, Ewald Kane, Helen S. Koloski and Alvin Shames (substituted for Hanna Feigenbaum by order dated January 20, 1976).



## Jurisdiction

Appellants, citizens and taxpayers of Ohio and the United States, filed their complaint in the District Court on November 18, 1975 alleging that a state statute, Ohio Revised Code §3317.06, violates the First and Fourteenth Amendments of the United States Constitution by effecting an establishment of religion. The complaint demanded preliminary and permanent injunctions against the enforcement of the statute, as well as other relief.

On December 22, 1975, pursuant to 28 U.S.C. §2284, a three-judge court was convened to hear and determine the suit. 2/

The judgment sought to be reviewed was entered by the three-judge district court below on July 21, 1976, upholding the constitutionality of the state statute and denying an injunction against its enforcement. Notice of appeal to this Court was filed in the District Court on August 10, 1976.

Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. §§1253 and 2281, and Flast v. Cohen, 392 U.S. 83 (1968).

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2/ The designation of the three judges was amended by further order on May 19, 1976, substituting Hon. Robert M. Duncan, District Judge for Hon. Carl B. Rubin, District Judge. The other participating judges were Hon. Joseph P. Kinneary, District Judge and Hon. John W. Peck, Circuit Judge.

## Statute Involved

The statute challenged in this litigation, Ohio Revised Code §3317.06 (also known as Senate Bill 170 and hereinafter sometimes called "SB 170" or the "Act") was signed into law on August 29, 1975. It generally replaces and expands the parochial assistance programs of former Ohio Revised Code §3317.062 which was invalidated 3/ on authority of Meek v. Pittenger, 421 U.S. 349 (1975) in the aftermath of this Court's decision of May 27, 1975 which vacated and remanded the District Court's previous judgment upholding the prior Ohio statute. See Wolman v. Essex, 421 U.S. 982, 95 S. Ct. 1985 (1975). The Act is several pages long and is appended to this jurisdictional statement (pp. A36-A40 infra.). Rather than quote it fully at this point, the relevant provisions will be summarized in the order in which they appear.

Section A provides for textbook loans to pupils or their parents.

Section B authorizes the school districts "to purchase and to loan to pupils attending

3/ By order of the District Court dated November 17, 1975, in Wolman v. Essex, No. 73-292 (S.D. Ohio E.D.). The order, entered by consent of the parties, found that the prior Ohio law was not constitutionally different from the law stricken down in Meek v. Pittenger, supra and declared it violative of the Establishment Clause.



nonpublic schools . . . or to their parents upon individual request, such secular, neutral and nonideological instructional materials as are in use in the public schools within the district and which are incapable of diversion to religious use and to hire clerical personnel to administer such lending program." As will hereinafter be discussed in further detail, it is stipulated 4/ that this section authorizes the same materials as had been authorized by the auxiliary materials provisions of the previous Ohio law which was stricken down in the wake of Meek v. Pittenger, S. 21.

Section C is identical to Section B, except that it authorizes instructional equipment instead of materials. Like Section B, the equipment available under this section is the same as the equipment which was available under the previous law to the extent it was upheld by the district court below prior to review by this Court (i.e., except to the extent it permitted materials and equipment which were regarded as susceptible of diversion to religious uses).

Section D authorizes the provision of "speech and hearing diagnostic services to pupils attending nonpublic schools . . ." Such services are to be "provided in the nonpublic school attended by the pupil receiving the service."

4/ The facts applicable to this case have been stipulated by the parties and references to pertinent paragraphs of the stipulation are cited "S" followed by the applicable paragraph number.

Section E provides for "physician, nursing, dental and optometric services" within the nonpublic schools.

Section G provides for "therapeutic psychological and speech and hearing to pupils attending nonpublic schools within the district." Unlike the diagnostic services, these services are to be "provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state Department of Education." Transportation to public schools or public centers at public expense is authorized.

Section H provides for "guidance and counseling services" to be performed in public schools, public centers or mobile units, in terms similar to those employed in Section G.

Section I provides for "remedial services" to be performed in public schools, public centers or mobile units, in terms similar to those employed in the two preceding sections.

Section J authorizes the district "to supply for use by pupils attending nonpublic schools . . such standardized tests and scoring services as are in use in the public schools of the state."

Section K authorizes "programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district." These, like the other remedial and therapeutic programs, are to be furnished off premises in public schools, public centers or mobile units.



Section L provides for field trip transportation.

Subsequent unlettered sections flesh out administrative and fiscal detail. Most pertinently:

> "The duties of clerical personnel, hired pursuant to divisions (B) and (C) of this section, shall include distribution of loan request forms, receipt and cataloging of loan requests, inventory or instructional materials and instructional equipment to pupils or their parents, retrieval of such instructional equipment and maintaining custody and storage of these items. The instructional material and instructional equipment authorized to be loaned pursuant to divisions (B) and (C) of this section may be stored on the premises of the nonpublic school of attendance and the clerical personnel hired for administration of the lending program may perform their services upon the premises of the nonpublic school when, in the determination of the state Department of Education, it is necessary and appropriate for efficient implementation of the lending program."

The remainder of the provisions of the Act limit benefits to those which are available to pupils attending the public schools within the district; require the furnishing of benefits and the admission of students and faculty hiring to be nondiscriminatory as to race, creed, color

or national origin; prohibit the provision of services, materials or equipment for use in religious courses, devotional exercises, religious training, or any other religious activity; and provide funding limitations.

## Questions Presented

1. Does a state statute which provides for the expenditure of public funds to furnish auxiliary materials and equipment for use within sectarian schools, including materials and equipment which cannot be loaned to such schools without violating the Establishment Clause of the First Amendment, satisfy the requirement of the Establishment Clause by authorizing the lending of such materials and equipment to the pupils and parents of pupils enrolled in such schools where such statute permits the materials and equipment to be stored on the sectarian premises and serviced there by public personnel, and where the materials and equipment so loaned include items which cannot practicably be distributed to individual pupils, but will be loaned to them as a group?

2. Does a state statute which provides for the expenditure of public funds to furnish diagnostic services which include speech and hearing services and psychological services 5/

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5/ As well as physician, nursing, dental, and optometric services which are not challenged in this suit.



on the premises of private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

3. Does a state statute which provides for the expenditure of public funds to furnish therapeutic and remedial services, guidance and counseling and other programs including services and programs which cannot be publicly provided on sectarian premises without violating the Establishment Clause of the First Amendment, satisfy the requirements of the Establishment Clause by authorizing the performance of such services by public personnel at locations off the sectarian premises which include mobile units parked nearby, and undefined public centers including centers used for such purposes only for the benefit of the sectarian beneficiaries of the services?

4. Does a state statute which provides for the expenditure of public funds to furnish standardized tests and scoring services for use in private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

5. Does a state statute which provides for the expenditure of public funds to furnish field trip transportation to classes attending private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

6. Does a state statute which provides for the expenditure of public funds to lend text

books to pupils or parents of pupils attending private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

## Statement of the Case

### A. History.

SB 170, challenged in this action, was signed into law on August 29, 1975, before the District Court below could consider and enter its remand decision on the previous statute. The biennial appropriation for SB 170 was eighty-eight million dollars, even larger than the eighty-one million dollars appropriated for its predecessor.

Appellants filed their complaint in this action on November 18, 1975, challenging the First Amendment validity of the new law; and on plaintiffs' motion, on December 10, 1975, the District Court granted a temporary restraining order against implementation of the Act. This restraining order was modified by consent order on February 13, 1976, to permit text books to be purchased from public funds and loaned to pupils of nonpublic schools or their parents to the extent such text book loans were permitted by this Court's decision in Meek v. Pittenger, 421 U.S. 349 (1975).

The designated panel of three judges (described at p. 3 n. 2 , supra) heard the case on June 1, 1976, on the briefs and



arguments of counsel and a comprehensive factual stipulation. On July 21, 1976, the District Court announced its decision and opinion upholding the Establishment Clause validity of the Act.

### B. The Factual Record.

During the proceedings below the implementation of the Act was generally enjoined and the position of the appellants was (and continues to be) that the Act is unconstitutional on its face. Nevertheless, on March 16, 1976, the parties filed a comprehensive stipulation of facts which, together with its appended exhibits, constitutes the factual record. The stipulation contains material relevant to the manner in which Ohio's Department of Education intended to implement the Act, and relevant to the appropriateness of Supreme Court review.

All procedural matters relevant to justiciability of the issue and standing of the parties are stipulated (S-1 through S-6). The sectarian character of nonpublic education in Ohio is stipulated in terms comparable to those upon which prior adjudications of parochial aid plans in this Court have been based (S-7 through S-13).

The general mechanical operation of the statute is described in S-14 through S-16. Most significantly, the Act is implemented through the 620 local school districts of Ohio, and there is no central collation of information

as to the character of the materials and services provided. It is thus realistically impossible for a concerned citizen or litigant to discover how the funds are used, except on a sample basis.

The intended methods of implementing the various specific programs are described (S-17 through S-38). In view of their prolixity, these stipulated facts will be discussed infra in connection with the discussion of the specific programs to which they relate, rather than summarized here. It is finally stipulated that because the "new law has not been implemented . . . the stipulation can only go to the intent and policies of the Department of Education rather than to the precise manner in which that intent of policy will or will not be carried out in all instances."(S-39).

The Questions Are Substantial

I.

The decision below is in substantial conflict with the decisions of this Court in Meek v. Pittenger 6/ and Marburger v. Public Funds for Public Schools of New Jersey.7/

6/ 421 U.S. 349 (1975).

7/ 358 F. Supp. 29 (N.J. Dist. 1973), aff'd 417 U.S. 961 (1974).



Last year this Court struck down Pennsylvania's statutory program for furnishing many programs which are effectively, and often procedurally, similar to the programs offered under SB 170 challenged in this action. Meek v. Pittenger, 421 U.S. 349 (1975). In Meek this court explicated its earlier decision to like effect in Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (N.J. Dist. 1973), aff'd 417 U.S. 961 (1974). Such programs prohibited by Meek and Marburger and resurrected in Ohio's current law include programs for the furnishing of auxiliary equipment and materials for use within the parochial schools, and the furnishing of a wide variety of services by public personnel for the benefit of those attending parochial schools.

As this Statement will further elaborate at Section III, A through G, pp. 14-34, infra, Ohio's SB 170 attempts to avoid the Meek and Marburger holdings via a few simple strategems which produce slight technical differences in the wording of the law, but little meaningful change from the results already prohibited by this Court as violative of the Establishment Clause.

The principal ploy involved in the differentiation of the materials and equipment program from previous invalid programs is that the property is now ostensibly loaned to pupils and parents rather than to the schools. The principal variant in the services programs is to limit services on the parochial premises to equipment care and diagnostic services, and to remove the therapeutic and remedial services

to an allegedly neutral site. As the remainder of this Statement will urge in further detail, the materials and equipment loan to pupils is merely a sham; the limitation of services on sectarian premises to "diagnostic" services does not ameliorate the aid to religion and excessive entanglement engendered by such programs under prior unconstitutional statutes; nor does the furnishing of therapeutic services on allegedly neutral sites which on the one hand constitute the sham of curbside service to the parochial schools and, on the other hand, promise to devote such public buildings as firehouses to the special educational use of parochial constituencies, avoid the pitfalls of previous invalid auxiliary service laws.

In short, Ohio's latest effort to assist religious school amounts to an end run around the Meek and Marburger holdings of this Court in a manner which requires full review.

II.

The issue is of nationwide concern.

Programs of state aid to religious private schools quickly spread from state to state. The history of parochial assistance litigation in this Court demonstrates that each decision invalidating a particular legislative scheme has had multi-state significance. Compare, for example, Meek v. Pittenger, supra, Public Funds for Public Schools v. Marburger, supra, and Wolman v. Essex, 421 U.S. 982, 95 S. Ct. 1985 (1975) (auxiliary services and materials);



Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio E.D. 1972) aff'd 409 U.S. 808 (1972); and Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1973) aff'd sub nom Grit v. Wolman, 413 U.S. 901 (1973) (tuition reimbursement and tax credits).

The District Court approval of the new Ohio assistance plan, which achieves results prohibited by Meek and Marburger will unquestionably be adopted across the United States. In order to prevent the widespread entrenchment of these programs of questionable First Amendment consequence, Supreme Court consideration of their validity is necessary and timely.

III.

The primary effect of the Act is to benefit religion and to foster excessive governmental entanglement with religion.

A. The Instructional Materials and Equipment Loan Provisions of SB 170 Violate the Establishment Clause.

In Meek v. Pittenger, this Court struck down Pennsylvania's statutory program for furnishing instructional materials and equipment. 421 U.S. at 366. The Pennsylvania law defined instructional equipment and materials in such a way as to include substantially the same equip-

ment and materials which could be furnished under Ohio's previous law, the now superseded R.C. Sec. 3317.062. The definition of "equipment" in the Pennsylvania Act included:

> "projection equipment, recording equipment, laboratory equipment, and any other educational secular, neutral, non-ideological equipment . . ." 421 U.S. at 354 n. 4.

The definition of "material" included:

> ". . .books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those discs and tapes, processed slides, transparencies, films, filmstrips, kinescopes and video tapes, or any other printed and published materials of a similar nature. . . The term includes such other secular, neutral, non-ideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." Ibid.

It is stipulated that (except for items allegedly incapable of religious use) the same equipment and materials will be available under SB 170 (see S-21), as was available under the previous auxiliary services and materials law. The list



set forth in the stipulation discloses that virtually all the items available under the Pennsylvania instructional equipment and material provisions invalidated in Meek are available under Sections B and C of SB 170.

The only noteworthy differences between Sections B and C of Ohio's law and the invalid provisions considered in Meek are that (i) Ohio's enactment expressly provides that only material and equipment which is "incapable of diversion to religious use" may be furnished; and (ii) the material and equipment is ostensibly "loaned" to the pupils or their parents, rather than loaned to the nonpublic school.

1. The restriction to materials and equipment incapable of diversion to religious use is insignificant and was rejected in Meek v. Pittenger.

While Ohio's SB 170 expressly contains the restriction against furnishing materials and equipment readily capable of diversion to religious use in the body of the Act, whereas Pennsylvania's law did not, the efficacy of such a restriction to save the measure from First Amendment challenge was explicitly rejected in Meek v. Pittenger. The district court in Meek, 8/ had held the furnishing of instructional materials and equipment to be

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8/ As well as the district court in the previous Ohio litigation, see Wolman v. Essex, ____F. Supp. _____ (S.D. Ohio 1974), vacated and remanded 421 U.S. 982 (1975).

constitutionally acceptable except to the extent that the statute authorized the loan of equipment "which from its nature can be diverted to religious purposes"--for example, projectors and recording equipment. 421 U. S. at 357.

Thus, in Meek, only the supplying of instructional equipment and materials ostensibly incapable of religious diversion was at issue. This Court so noted at 421 U. S. p. 357, n. 7. The statutory limitation requiring that loans be limited to materials and equipment incapable of diversion adds no element which has not been passed upon by the Supreme Court in a manner adverse to the defendants. 9/

2. The fact that the materials and equipment are to be ostensibly loaned to pupils or parents is a constitutionally insignificant sham.

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9/ The stipulation recites that "it is expected that materials and equipment loaned to pupils or parents under the new law will be similar to . . . former materials and equipment except to the extent that the law requires that materials and equipment capable of diversion to religious issues will not be supplied. Plaintiffs reserve the right to argue that the two stated differences are not significant and that the restriction against supplying materials and equipment incapable of religious diversion cannot in fact be implemented. S-21. (Emphasis added)



The District Court below found that the distinction between lending materials and equipment to parochial schools and lending them to the student body was constitutionally decisive and approved this portion of SB 170 on that basis. (Opinion, App. p. A15-17). However, in Committee for Public Education v. Nyquist, 413 U. S. 756 (1973), this Court noted that:

> "[t]here can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools . . . In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." 413 U. S. at 780.
>
> "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools . . . The effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." Ibid.

While SB 170 purports to limit the aid to so-called secular, neutral and nonideological materials and equipment, the teaching of Meek v. Pittenger is that the effort to limit aid to the secular portion of the school's program is illusory in view of the

"pervasive" and "inextricably intertwined" character of the religious involvement of the parochial schools. 421 U. S. at 366; and see Hunt v. McNair, 413 U.S. 734, 743 (1973). For this reason the legislative feint of lending to students and parents does not change the result decreed in Meek.

Under SB 170 there is no difference between a loan to the school and a loan to the pupils or parents. First, the materials and equipment to be loaned are not limited to items which can be meaningfully distributed to individual pupils, such as textbooks. The pupils can collectively borrow laboratories, maps and globes, posters, gymnastic equipment, sewing machines and a host of other items. See S-21 and Exh. C thereto.

Second, the statute expressly authorizes the storage of these materials and this equipment on the nonpublic school premises. While the lending is to be initiated by "individual request" it is naive to believe that what is requested will not be determined by the requirements of the nonpublic school administration and faculty.

The net result is that while the pupils or their parents may be the technical bailees of the loaned equipment and materials, the equipment and materials will be deployed in exactly the same manner as under the prior law pursuant to which they were loaned to the school. 10/

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10/ The Act further authorizes (and it is stipulated that the authority will be exercised,



The conclusion is compelled that Sections B and C of SB 170 violate the Establishment Clause. Without meaningful variation they provide the same program for the furnishing of instructional materials and equipment to sectarian institutions which is barred by Meek v. Pittenger.

B. Psychological and Speech and Hearing Diagnostic Services Provided by SB 170 Violate the Establishment Clause.

While appellants have conceded the facial constitutionality of physician, nursing, dental and optometric services provided under the Act, psychological services, and to only a lesser extent speech and hearing services, provided within the parochial schools, stand on a different footing.

Meek v. Pittenger and Marburger prohibit the furnishing of publicly funded personnel, except certain health personnel, on parochial

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see S-22) public personnel to distribute loan request forms, receive and catalog the requests, maintain inventories, distribute the material and equipment, collect the equipment, maintain custody and storage of the material and equipment and perform all other duties necessary for the efficient implementation of the program. Under the Act, these functions can be performed on the premises of the nonpublic school. These provisions alone should suffice to invalidate the program programs for excessive entanglement. See Lemon v. Kurtzman, 403 U.S. 602 (1971).

school premises.

The Pennsylvania law considered in Meek, called for "auxiliary services" to be performed by public employees on parochial school premises, including remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services. 421 U.S. at 367. The Pennsylvania public institutions, like those of Ohio, provided no surveillance to confirm that the law's secular limits were being observed, because it was felt that such surveillance was unnecessary to assure that a member of the staff had not "succumb[ed] to sectarianization of his or her professional work." 421 U.S. at 368, quoting from the district court opinion, 374 F. Supp. at 657. This Court rejected this position.

> ". . .[D]ecisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." 421 U.S. at 369.

Regarding the auxiliary character of the services to be performed by these publicly subsidized teachers, this Court noted:

> "That Act 194 authorizes state-funding of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum, does not distinguish this



> case from Earley v. DiCenso and Lemon v. Kurtzman, supra. Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists. The likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient: 'The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.' 403 U.S. at 619. And a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities." 421 U.S. at 370-371. (Emphasis added and footnote deleted.)

The foregoing portion of the Meek opinion establishes that the First Amendment strictures against public funding of services to be performed by public employees on parochial premises extend to "counselors" and other "remedial" personnel as well as to teachers. In tacit recognition of this principle, the framers of SB 170 removed the more patently remedial and therapeutic services from the parochial premises to the curbside. And, while presumably the most narrowly physical health services such as physician, nursing, dental

and optometric are protected by the Supreme Court's dictum approving such services (see 421 U.S. at 371 n. 21), no such protection should be extended to psychological and speech and hearing services.

Psychological diagnosis:

The functions of diagnostic psychological personnel include, in addition to aptitude testing, "individual measures to determine social and behavioral adaptability . . . interviewing and. . . projective procedures." S-28(b). On the face of this description, these functions include a degree of intercommunication between the diagnostician and the pupil, and an intrusion into the social and behavioral aspects of the pupil's personality, which provides at least as great an opportunity for religious influence as does the guidance counseling, testing, and remedial instruction prohibited in the parochial schools by Meek and Marburger, supra, and Levitt v. Committee for Public Education, 413 U.S. 472, 93 S. Ct. 2814 (1973).

The conclusion is compelled that it is excessively entangling for experts employed by the government to tinker with the attitudes and personality of a pupil in the setting of a religious institution. There is too great a danger, for example, that irreverent or heretical attitudes and beliefs will be interpreted as psychologically deviant or antisocial.



Speech and hearing diagnosis:

Despite this Court's dictum in Meek that a program of diagnostic speech and hearing services "seems to fall within that class of general welfare services for children that may be provided by the State. . ." 421 U.S. at 371 n. 21, there is reason to prohibit state sponsored speech and hearing services in parochial schools as well. In Meek, speech and hearing diagnostic services were stricken down because they would have been left standing alone; and notwithstanding the Pennsylvania law's severability clause, the Court ruled that the legislature "would not have passed the law solely to provide such aid." Ibid. Footnote 21 of Meek v. Pittenger remains dictum and the matter remains open for decision by this Court. In drawing the line between general welfare provisions and impermissible remedial education measures prohibited by Meek and Marburger, it would appear logical to consider the opportunity for sectarian influence and abuse. See Meek, 421 U.S. at 369. Unlike a physician or a nurse whose contact with the child is ordinarily limited to a physical appraisal and a minimal amount of verbal communication concerning the child's physical condition, the speech and hearing staff can be expected to communicate with a pupil at length in order to assess the child's communicative abilities.

It is no more sensible to lump speech and hearing diagnosticians together with doctors and nurses than with remedial reading instructors and other remedial services personnel who cannot, under Meek and Marburger, perform their services within a parochial school.

C. Therapeutic Psychological and Speech and Hearing Services, Guidance and Counseling Services, Remedial Services and Services for the Handicapped Provided by SB 170 Violate the Establishment Clause Except to the Extent Furnished Within Public Schools As Part of a General Program.

The therapeutic, counseling and remedial services encompassed by Sections G, H, I and K plainly extend far beyond the neutral health services approved by dictum in prior Supreme Court decisions. They include such specifically condemned programs as remedial reading and guidance counseling. Compare S-31 through 36 with Meek v. Pittenger, 421 U.S. at 367. 11/ Accordingly, these programs stand or fall on the constitutional effect of diverting them from within the school to a public school, or to a public center or mobile unit stationed off the nonpublic premises.

While the furnishing of governmentally subsidized services to pupils enrolled in a public school on the same basis as such services are provided for public school pupils in that school

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11/ For example, the remedial services for the handicapped are not limited to health programs. See S-36(d) and (e). These programs are to be instructional. However much one may sympathize with a handicapped child, it is no more proper to subsidize his education in a religious school than to subsidize such education for a normal child.



presents grave problems of excessive entanglement in the scheduling and integration of such services, it would appear that a statute authorizes parochial pupils to enter a public school and receive such services is not facially invalid; and accordingly, appellants do not challenge the furnishing of such services in the public schools 12/ to the extent the services are provided as part of the public school's general programs. However, the furnishing of such services in other centers or in mobile units presents different First Amendment problems. Insofar as SB 170 permits these programs at such locations it is facially invalid.

The use of mobile units results in the perpetuation of evils presented by on-premises auxiliary services.

It is stipulated that where mobile units are employed they will be stationed close to the nonpublic premises and except in unusual circumstances will be devoted exclusively to the service of the parochial pupils. (S-33). In other words, a publicly purchased mobile home can be parked in a lot next to the parochial school, or at its curbside, and public personnel will operate it as an auxiliary adjunct to the parochial school to

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12/ Appellants reserve the right to attack the application of this portion of the statute if a different program is administered for parochial pupils within a public school, or if excessive entanglement appears.

provide services which could not be performed within the walls of the school itself. The only difference between these services performed in mobile units under SB 170, and the services unconstitutionally furnished under the former Ohio law or the Pennsylvania and Michigan laws previously stricken down, is the technical question of title to the classroom.

This Court has cautioned that parochial aid schemes are not to be evaluated in "a legalistic minuet in which precise rules and forms must govern." Lemon v. Kurtzman, 403 U. S. 602, 614 (1971). Rather, "the form of the relationship" must be examined "for the light it casts on the substance." Ibid.

It is difficult to discern why a special satellite facility for parochial pupils parked outside the gate but devoted entirely to the nonpublic institution to which it is appended should provide materially less opportunity for the fostering of religion than the same unit inside the walls. One might concede that religious artifacts may be absent from the mobile unit's walls; but that is about the only discernible difference.

The furnishing of services in public centers presents problems of special benefit to a sectarian class and lack of guarantees against fostering religion or excessive entanglement.

It is stipulated that if "a program is to be offered at a public center such as a library, public meeting hall, firehouse, or recreation center, services may be available for public and nonpublic



pupils at the same center." S-33 (underscoring added). Since Ohio law does not provide for such services to be rendered for public school students at such public centers at this time, it is highly speculative that such services will in fact be rendered to public school students at public centers.

Appellants have no quarrel with making public centers available to pupils enrolled in nonpublic schools for the same purposes for which those facilities are available to the public. For example, it would be unthinkable to deny some pupils access to libraries, museums, parks, zoos and the like because they are enrolled in parochial schools. However, that is not the case when a special program is instituted in a public center for the special benefit of parochial pupils which is either not available to public school pupils at that center or is only made available to them in order to justify the assistance to the parochial constituency. In either case, the public benefit must be regarded as incidental, and the primary purpose and effect must be deemed to constitute assistance to religion. The program is a benefit to a limited sectarian class, and suspect on that basis. See Committee for Public Education v. Nyquist, 413 U. S. 756, 783 n. 38 (1973).

Moreover, the Act does not specify the character of the public centers at which the services are to be rendered; and while the stipulation names a few of such centers (S-33), the listing is not recited to be exclusive. There is nothing in the Act to preclude a substantial portion of the eighty-eight million dollars from being expended on the capital cost of erecting centers which are

public in the sense of belonging to the school district, but which are brought into being solely to effectuate the provisions of the Act for the benefit of nonpublic school pupils.

D. Standardized Testing and Scoring Services Provided by SB 170 Violate the Establishment Clause.

In Levitt v. Committee for Public Education, 413 U.S. 472, 93 S. Ct. 2814 (1973) this Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for expenses of examination and testing of pupils. The basis for the rejection of this program was not merely that it involved the payment of money to the nonpublic schools, but that testing is an "integral part of the teaching process." 413 U.S. at 481 quoting with approval from the holding of the district court, 342 F. Supp. at 444.

It is true that most of the testing involved in Levitt was teacher prepared, whereas the tests authorized by Section J of SB 170 are "standardized." However, the thrust of Meek v. Pittenger is that given the pervasive religious mission and character of the parochial schools, "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed . . ." 421 U.S. at 365.

Testing, even when standardized, remains an "integral part of the teaching process", Levitt, supra (413 U.S. at 481). As such, testing is not a



denominationally neutral health service; nor is it an item which can be distributed to each child in the parochial and public schools like a textbook. It involves personnel of the state in scoring to measure the progress of pupils in their subjects at the parochial schools (S-37). Considering the factor of pervasive religious infusion found by this Court in Meek, the fact that the subjects thus scored are nominally secular can make no difference. The predominantly sectarian teaching mission of the parochial school is a primary and direct beneficiary. The Establishment Clause is thereby violated.

E. Field Trip Transportation Authorized by SB 170 Violates the Establishment Clause.

Bus transportation to and from parochial schools, approved in Everson v. Board of Education, 330 U.S. 1 (1947) was thought to approach "the verge." Id. at 16. See Lemon v. Kurtzman, 403 U.S. 602, 624 (1971). At least the transportation approved in Everson involved getting the child to and from school at regular morning and afternoon times. That transportation did not involve assistance to any specific portion of the educational program of the parochial school; and the scheduling entanglements which it entailed, though certainly substantial, were relatively predictable and manageable. To the contrary, field trip transportation is stipulated to be for the purpose "to enrich the secular studies of students." (S-38). As such it bears a direct relation to the educational program of the school, which the state is not permitted to enhance. See Meek, supra.

Moreover, the opportunities and necessity for excessive entanglement are greatly exacerbated in the case of field trip transportation in view of potential competing scheduling demands of public and private schools.

If the busing approved in Everson "was thought to approach the 'verge'" (Lemon, 403 U. S. at 624), the field trip transportation contemplated by SB 170 must be deemed to have stepped beyond the precipice.

F. The Programs Authorized by SB 170 Foster Excessive Political Entanglement.

In passing upon the Pennsylvania services and materials law, this Court reaffirmed that the political entanglement engendered by such a law is an additional constitutionally fatal flaw.

> "The Act . . . provides successive oppportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect . . . This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary services personnel remain strictly neutral and nonideological when functioning in church-related schools compels the conclusion that Act 194 violates the constitutional prohibition against laws 'respecting an establishment of religion.'" Meek v. Pittenger, 421 U. S. 349, 372 (1975).



The appropriations under Ohio's parochial aid law are much larger than those which the Supreme Court considered in Meek, Id. at 365 n. 15 and 369 n. 19. This Court has witnessed the galloping increases in such appropriations under Ohio's previous aid schemes presented to it for Establishment Clause adjudication. The biennial appropriation for parental grants at the beginning of this decade was in the vicinity of $60,000.00. See Wolman v. Essex, 342 F. Supp. 399, 403 n. 3 (1972). As the district court below remarked:

> "It requires no special wisdom to foresee that the Act, insofar as it confers benefits upon a predominately sectarian class, increases the likelihood that further debate concerning this law will be along religious lines. . . Even if couched in superficially fiscal terms, future legislative voices, both those that favor and those that oppose the Act will, by implication and construction, be debating the relative merits of religiously oriented education." Kosydar v. Wolman, 353 F. Supp. 744, 766 (1972), aff'd sub nom. Grit v. Wolman, 413 U. S. 901 (1973).

Whether or not this potential for political divisiveness would be sufficient to invalidate SB 170 absent other considerations, Cf. Committee for Public Education v. Nyquist, 413 U. S. 756, 797-798 (1973), "it is certainly a 'warning signal' not to be ignored." Ibid. This political entanglement aspect infects all but the most clearly neutral and nonsectarian portions of SB 170

and compels conclusion that of the various programs authorized by this law, only the most narrowly conceived health services should be sustained.

G. The Textbook Loan Provisions of SB 170 Violate the Establishment Clause.

Although the appellee public officers have stipulated the intention of the state Department of Education to implement the textbook provision in a manner which is similar to that upheld in Meek v. Pittenger, 421 U.S. 349, 362 (1975) and Board of Education v. Allen, 392 U.S. 236 (1968), the Ohio enactment, on its face, is broader than that approved in these previous decisions. It includes textbook "substitutes." Moreover, for the reasons well expressed in the dissenting opinion of Justice Douglas in Board of Education v. Allen, 392 U.S. at 254-266, there is important reason to overrule these previous textbook decisions. 13/ While the content of a textbook may be fixed in the sense that the print on the page will not change, the manner of presentation can make the textbook one of the most powerful tools for the infusion of sectarian influence. "The textbook goes to the very heart of education in a parochial school." Id. at 257. Accordingly, if plenary review is granted, appellants will urge this Court to overrule or limit its previous decisions approving

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13/ Also see Meek v. Pittenger, 421 U.S. 349, 373-385 (1975) (Brennan, J. dissenting).



state subsidization of textbook loans for parochial schools.

## CONCLUSION

For the foregoing reasons appellants respectfully urge the Court to note jurisdiction and grant plenary review of this appeal.

Respectfully submitted,

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October, 1976

# APPENDICES



ORDER AND OPINION BELOW

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C-2-75-792

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BENSON A. WOLMAN, et al,

Plaintiffs,

-vs.-

MARTIN W. ESSEX, et al,

Defendants.

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ORDER

For the reasons and on grounds that more fully appear in the Opinion filed simultaneously herewith, it is concluded that Section 3317.06 of the Ohio Revised Code is constitutional and that plaintiffs' complaint is without merit.

IT IS THEREFORE ORDERED THAT the complaint be and it hereby is DISMISSED.

BY ORDER OF THE COURT

John W. Peck
Judge, United States Court of Appeals for the Sixth Circuit

Joseph P. Kinneary
United States District Judge

Robert M. Duncan
United States District Judge

OPINION OF THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

BENSON A. WOLMAN, et al,

Plaintiffs,

vs.

MARTIN W. ESSEX, et al,

Defendants.

No. C-2-75-792

(Filed July 21, 1976)

Before John W. Peck, Circuit Judge, and Joseph P. Kinneary and Robert M. Duncan, District Judges.

Kinneary, District Judge. In this action plaintiffs attack the constitutionality of Ohio Revised Code Section 3317.06, pursuant to which certain services and materials routinely made available to students attending public schools throughout the state are made available to elementary and secondary nonpublic schoolchildren as well.

This matter is before the Court on the complaint and the answers, various memoranda submitted by the parties, an extensive stipulation of facts and the exhibits of the parties.



The action was commenced under the provisions of Title 42, United States Code, Section 1983, and the Court has jurisdiction over the subject matter of this action under the provisions of Title 28, United States Code, Section 1343.

On July 1, 1975 this Court upheld the constitutionality of Ohio Revised Code Section 3317.062, the predecessor statute to that under consideration in this action, to the extent that the former statute provided only secular, neutral and nonideological services and materials to students attending nonpublic schools. While appeal of this Court's decision was pending, the United States Supreme Court rendered its decision in Meek v. Pittenger, 421 U.S. 349 (1975), and held that a Pennsylvania statute similar to the former Ohio statute was unconstitutional.

The Supreme Court vacated the judgment of this Court and remanded the case for further consideration in light of its decision in Meek. The Ohio General Assembly thereafter repealed the former statute and enacted the provisions now codified in §3317.06 O.R.C. On November 17, 1975, this Court entered a consent order declaring the former statute to be violative of the First and Fourteenth Amendments.

In this action, this Court is once again called upon to review the constitutionality of Ohio's legislative attempts to provide auxiliary services and educational materials to the nonpublic schoolchildren throughout the state.

A three judge court was convened pursuant to Title 28, United States Code, Sections

2281 and 2284. On December 10, 1975, a temporary restraining order was issued prohibiting the defendants from implementing any provision of the statute. With the consent of the parties, that order was subsequently modified to permit the expenditure of monies necessary to purchase textbooks and textbook substitutes and to lend such items to nonpublic school pupils or to their parents pursuant to the statute.

I.

Plaintiffs in this action are citizens and taxpayers of the United States and of the State of Ohio, and this Court concludes that these individual plaintiffs have standing to challenge the statute. Flast v. Cohen, 392 U.S. 83 (1968). The defendants are various state and local officials charged with the implementation of the statute, and parents of children attending various nonpublic schools and who are potential recipients of the materials and services authorized by the statute.

Section 3317.06 O.R.C. was enacted as a portion of an omnibus education bill, and most of its sections relate to public school assistance. Briefly, the statute authorizes expenditure of monies by local school districts to purchase and supply to elementary and secondary schoolchildren attending nonpublic schools within the districts or to their parents the following independant and fully severable materials and services: secular textbooks, or textbook substitutes, approved for use in the public schools, §3317.06(A) O.R.C.; secular and nonideological instructional materials and equipment as are in use in the public schools and which are incapable of diversion to



religious use, and to hire clerical personnel to administer the lending program, §3317.06(B), (C) O.R.C.; speech and hearing diagnostic services, physician, nursing, dental and optometric services, and diagnostic psychological services, to be provided in the nonpublic schools, §3317.06 (D), (E), (F) O.R.C.; therapeutic psychological and speech and hearing services, guidance and counseling services, remedial services, and programs for the deaf, blind, emotionally disturbed, crippled and physically handicapped children, to be provided in the public school, in public centers or in mobile units located off the nonpublic school premises, and transportation as needed, §3317.06 (G), (H), (I), (K) O.R.C.; standardized tests and scoring services such as are in use in the public schools of the state, §3317.06(J) O.R.C.; field trip transportation and services as are provided to public school students, §3317.06(L) O.R.C.

Under the statute, funds appropriated by the legislature are allocated by the Ohio Department of Education to the various local public school districts twice per year, based upon the estimated annual average daily membership in nonpublic elementary and high schools located within the district. Each local school district will then utilize the money either to purchase approved secular textbooks, instructional materials and equipment, standardized testing and scoring services and field trip transportation or to provide the diagnostic, remedial and therapeutic services authorized by the statute.

Textbooks, instructional materials and equipment, and standardized tests and scoring

services are to be purchased directly from the supplier by the local public school district. Auxiliary health and special educational service personnel will be hired and paid by the local public school districts. Such personnel, furthermore, are to be controlled and supervised by the local public school districts.

Provision of the services or materials authorized by the statute is initiated by an application submitted to the local public school district from nonpublic school representatives. This application receives administrative approval or disapproval by the local public school district after consultation with a field service coordinator from the Ohio Department of Education, and formal approval from the local public school board of education.

The statute makes clear that the materials and services available under the statute are limited to those available to pupils attending the public schools within the district and, further, that the materials and services are to be made available to pupils attending only those nonpublic schools whose admission policies make no distinction as to race, creed, color or national origin of either its pupils or of its teachers.

II

According to the stipulations of the parties, approximately 96 percent of Ohio's nonpublic schools are denominational, and during the 1974-1975 academic year, Ohio's nonpublic schools educated over 250,000 students. The parties have furnished to the Court information regarding the operations of the



Columbus Catholic elementary and secondary schools, stipulated to be fairly representative of the Catholic schools throughout the State of Ohio, which constitute approximately 86 percent of Ohio's nonpublic schools. These schools operate under the general supervision of the diocesan Bishop. While most (but not all) of the principals of such schools are religious personnel, more than two-thirds of the teachers in such schools are not. Further, most religious teachers no longer wear distinctive religious habits. Finally, the facilities of these schools often display a Christian symbol as well as the American flag.

All such schools teach the secular subjects required to meet the state minimum standards, and the parties have stipulated that, during the required secular courses, the pupils attending nonpublic schools are taught a course content generally equivalent to that taught in public schools. The state mandated five-hour school day is expanded to such schools to accommodate religious instruction and devotion for Catholic students. Discussion of topics upon which the Catholic Church has articulated a position are programmed to take place only in religion classes.

Teachers in such schools, a majority of whom are members of the Catholic faith, are employees of the schools in which they teach. However, no teacher in any such school is required to teach religious doctrine as a part of or to integrate religious doctrine into the required secular courses taught in the school.

Finally, it is to be noted that the statute challenged in this action extends the benefits provided thereunder only to those pupils attending nonpublic schools whose admission policies and hiring practices with respect to teachers make no distinction as to race, creed, color or national origin.

Although the stipulations of the parties evidence several significant points of distinction, the character of these schools is substantially comparable to that of the schools involved in Lemon v. Kurtzman, 403 U.S. 602, 615-18 (1971).[1]

III

The Establishment Clause prohibits "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission, 397 U.S. 664, 668 (1970). However, the Constitution does not compel an absolute separation between the state and religious institutions. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 760-61 (1973). Thus some benefits extended to the public at large are constitutionally permissible, despite the result-

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[1]But compare this profile with those in Roemer v. Board of Public Works of Maryland, ___ U.S. ___, 44 U.S.L.W. 4939 (June 21, 1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).



ing indirect and incidental benefits flowing to religious institutions. Lemon v. Kurtzman, supra, 403 U.S. 602, 614. The Supreme Court has never held that all public aid to private education is prohibited:

> [W]here carefully limited ... , States may assist church-related schools in performing their secular functions, ... not only because the States have a substantial interest in the quality of education being provided by private schools, ... but more importantly because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others.

Norwood v. Harrison, 413 U.S. 455, 468 (1973).

In Lemon v. Kurtzman, supra, 403 U.S. 602, the Supreme Court established a tripartite Establishment Clause test by which state action in this area is to be judged.

> ... First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion."

403 U.S. at 612. This test, clear in its articulation if difficult in its application, is stated in terms of degree.

> It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objective of the Establishment Clause have been impaired.

Meek v. Pittenger, supra, 421 U.S. 349, 359 (1975).

Because the state has a legitimate interest in the care and education of its children, it cannot be denied that the legislation presently before this Court meets the first prong of the constitutional standard. See Kosydar v. Wolman, 353 F.Supp. 744, 751 (S.D. Ohio 1973), aff'd. sub nom Grit v. Wolman, 413 U.S. 901 (1974); Wolman v. Essex, 342 F.Supp. 399, 411 n. 13 (S.D. Ohio), aff'd., 409 U.S. 808 (1972).

The statute must be carefully examined, however, in an effort to determine whether the legislation has the principal or primary effect of advancing religion or results in an excessive government entanglement with religion.

IV

A. Textbooks



Section 3317.06(A) O.R.C. authorizes the lending of such secular textbooks as have been approved by the superintendent of public instruction for use in public schools to pupils attending nonpublic schools or to their parents. The statute defines "textbook" to mean "any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends." The parties have stipulated that the materials provided under this portion of the statute shall be limited to "books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available to the individual use of each pupil in such class or group."

Administratively, individual requests for such materials are to be submitted by nonpublic pupils or by their parents, and those requests will then be summarized by the nonpublic school and forwarded to the appropriate public school official.

On its face, this aspect of the statute is constitutionally indistinguishable from the textbook provisions upheld in Board of Education v. Allen, 392 U.S. 236 (1968) and in Meek v. Pittenger, supra, 421 U.S. 349. This Court is therefore of the opinion that that portion of §3317.06 O.R.C. providing testbooks or textbook substitutes to nonpublic pupils or to their parents does not contravene the First or Fourteenth Amendments.

B. Instructional Material and Equipment

Section 3317.06(B) and (C) O.R.C. authorizes the local school districts to purchase and lend to nonpublic school pupils or to their parents instructional materials and equipment that are incapable of diversion to religious use, and to hire clerical personnel to administer the program. Examples of equipment supplied in the past under predecessor statutes include weather forecasting charts, lunar terrain models, fossil collections, and metric system materials. The statute further provides that the materials and equipment lent pursuant to the statute may be stored on the premises of the nonpublic school and the clerical personnel hired to administer the lending program may perform their duties upon the premises of the nonpublic school when necessary.

The duties of the clerical personnel hired to administer the lending program includes: distribution of loan request forms and receipt of requests, maintenance of inventory, collection and distribution of materials and equipment, maintenance of custody and storage and other duties necessary for the efficient implementation of the program.

The parties have stipulated that most public school districts will simultaneously purchase all the equipment and materials necessary for all the students in the district, both public and nonpublic, from common suppliers and, where appropriate, will employ a bidding procedure in the purchases.



The United States Supreme Court in Meek v. Pittenger, supra, 421 U.S. 349, was presented with a Pennsylvania program authorizing the lending to the nonpublic schools of that state instructional materials and equipment. The Supreme Court recognized that the materials and equipment to be provided under the statute challenged in that action could not be diverted to religious use and thus would not involve the state in an entangling policing relationship with the nonpublic schools. Meek, supra, 421 U.S. at 365. Nevertheless, the Supreme Court found the program to be violative of the Establishment Clause, and the Court's sole apparent objection to the Pennsylvania instructional materials and equipment program was to the form of the program.

> Although textbooks are lent only to students, Act 195 authorizes the loan of instructional material and equipment directly to qualifying nonpublic elementary and secondary schools in the Commonwealth.

Meek, supra, 421 U.S. at 362-63.[2] See also

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[2]The Supreme Court in Meek, supra, 421 U.S. at 361 n. 10 did note that, prior to the commencement of the New York and Pennsylvania textbook programs upheld in Meek and in Allen, the parents of nonpublic school-children purchased thier own textbooks. The evidence presently before this Court does not indicate whether or not parents of Ohio's nonpublic schoolchildren purchased the textbooks for their children prior to the initiation of either the textbook

Roemer v. Board of Public Works of Maryland, ___ U.S. ___, 44 U.S.L.W. 4939, 4944 (June 21, 1976). The Ohio statute authorizes, in an attempt to meet the constitutional objections articulated in Meek, the lending of such materials and equipment not to the nonpublic schools, but only to nonpublic schoolchildren or to their parents.

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or instructional materials and equipment programs, which were first instituted in Ohio nine years ago.

It remains unclear, however, whether this fact is determinative in an Establishment Clause inquiry:

> Here [federal legislation] is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld.

Tilton v. Richardson, 403 U.S. 672, 679 (1971) [emphasis supplied].



Plaintiffs argue, understandably, that an unconstitutional program conferring benefits directly upon the nonpublic school cannot be rendered constitutional merely by conferring those same benefits directly upon the pupils of that school. See Committee for Public Education and Religious Liberty v. Nyquist, supra, 413 U.S. 756, 781. Indeed, the Supreme Court itself, in holding the Pennsylvania instructional materials and equipment program unconstitutional on the ground that it had the impermissible primary effect of advancing religion, cited for support Sloan v. Lemon, 413 U.S. 825 (1973), which held invalid on the same ground a parent tuition reimbursement plan. Meek, supra, 421 U.S. at 364. Of course, both Nyquist and Sloan may be distinguished from the present case in that the monetary aid at issue in those cases was, absent excessive governmental entanglement with religion, incapable of restriction to purely secular usage.

In portions of its opinion in Meek, the Supreme Court seems to indicate that all aid flowing to the core educational functions of the nonpublic school is impermissible.[3] None-

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3 It is, of course, true that as a part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities -- secular and non-ideological services unrelated to the primary, religion-oriented educational function of the sectarian school. The

theless, the Supreme Court in Meek reaffirms state aid in the form of textbooks -- undeniably an integral part of any nonpublic school's core educational functions. Further, this Court is unable to determine a substantive difference between textbooks on the one hand and maps, charts, models and collections on the other, except, possibly, the relative effectiveness of the latter in attracting the attention of a particular student and in educating him.[4] In the view of this Court, however, the determination of pedagogical effectiveness is better left to educators than to the courts.

The Supreme Court has recognized that the education provided by nonpublic church-related schools is in part secular and in part sectarian, and that "some forms of aid may be channeled to the secular without providing direct aid to the sectarian." Committee for Public Education and Religious Liberty v. Nyquist, supra, 413 U.S. at 775. The educational materials and equipment provided by

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> indirect and incidental benefits to church-related schools from those programs do not offend the constitutional prohibition against establishment of religion.

Meek, supra, 421 U.S. at 364.

[4]The Court notes that, under the statute, instructional materials and equipment may be stored on the nonpublic premises. This fact, however, was not determinative in either Allen or Meek. See Meek v. Pittenger, 421 U.S. at 361 n. 9.



§3317.06 O.R.C. are, like textbooks, inherently secular and incapable of diversion to religious use. Further, the administrative involvement required by the statute of public personnel implementing the program is purely clerical and requires no more surveillance over or entanglement with the religious functions of the nonpublic school than does the involvement required of public personnel implementing the textbook programs upheld in Allen and in Meek. Since the nature of the clerical duties envisioned by the statute is not such as would render the personnel involved susceptible to religious influence, there is no danger that the state will become excessively involved in the religious character of the nonpublic institution.

In view of this Court, then, the Ohio instructional materials and equipment program differs neither in form nor in substance from the textbook programs previously found by the United States Supreme Court to be constitutional.

C. Diagnostic and Health Services

Section 3317.06(D), (E) and (F) authorizes the provision of such services as speech and hearing diagnosis, physician, nursing, dental and optometric services and psychological diagnosis, to take place in the nonpublic schools. The statute further authorizes the local public school districts to contract with the state department of public health in order to provide such services to the pupils attending the nonpublic schools. The parties

have stipulated that the purpose of these services is to determine if nonpublic pupils are deficient or in need of assistance in these areas.

Administratively, nonpublic school personnel will participate in the program only insofar as their cooperation is necessary to schedule, provide space and, in some instances, identify children in need of such diagnostic services. The personnel actually providing the diagnostic and health services, however, are employed by the public board of education, are under its control, and subject to periodic inspection by their supervisors solely for determination as to whether the service personnel are engaged in the proper performance of their diagnosis of health problems.

The Supreme Court in Meek v. Pittenger, supra, 421 U.S. 349, held that Pennsylvania's auxiliary services act, which provided on the nonpublic premises remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services, violated the Establishment Clause since excessive entanglement would be required for the state to assure that the professional staff members providing such services do not advance the religious mission of the nonpublic school. The Court did not hold, however, that such programs may never be extended to nonpublic schoolchildren.

> The appellants do not challenge, and we do not question, the authority of the Pennsylvania General Assembly to make free auxiliary services available to all students



> in the Commonwealth, including those who attend church-related schools.

Meek v. Pittenger, supra, 421 U.S. at 368 n.17 [emphasis supplied].[5] The Court focused upon the academic functions of the remedial services provided in the Pennsylvania statute, and found that the personnel providing the auxiliary services were, for the most part, teachers. 421 U.S. at 370. Because the services in that case were to be provided on the nonpublic school premises, the Court found that the program was constitutionally indistinguishable from those found to be unconstitutional in Lemon v. Kurtzman, supra, 403 U.S. 602.

Accordingly, §3317.06 O.R.C. distinguishes diagnostic and health services that are concerned with the detection of health problems on the one hand, and treatment services that are concerned with the remedy of those problems on the other. The former are provided,

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[5]But see Meek v. Pittenger, 421 U.S. at 369 [footnote omitted]:

> We need not decide whether substantial state expenditures to enrich the curricula of church-related elementary and secondary schools, like the expenditure of state funds to support the basic educational program of those schools, necessarily result in the direct and substantial advancement of religious activity.

pursuant to the statute, on the nonpublic school premises, but the latter are not.

1. Physician, nursing, dental and optometric services. The plaintiffs in this action do not challenge this provision, and the Supreme Court has repeatedly stated that the states may constitutionally provide public health and welfare benefits to all of their young citizens, whether they attend public or nonpublic schools. Meek v. Pittenger, supra, 421 U.S. at 371 n.21; Lemon v. Kurtzman, supra, 403 U.S. at 616-17. This Court is of the opinion that the provision of these narrow health programs on the premises of the nonpublic school neither has the primary effect of advancing the religious mission of those schools nor involves the personnel providing such services in an excessively entangling relationship with those schools.

2. Speech and Hearing Diagnosis. The Supreme Court in Meek held Pennsylvania's auxiliary services act unconstitutional in its entirety, but indicated that it would have upheld the constitutionality of certain of the provisions of that act had severance been appropriate:

> [The Act's] authorization of "speech and hearing services," at least to the extent such services are diagnostic, seems to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools.

421 U.S. at 371 n.21.



In their stipulations, the parties describe the functions of the speech and hearing diagnostic staff to include identification of those children suffering speech and hearing handicaps and referral of such children to therapists for treatment. The duties of these specialists include cooperation with medical personnel in developing an appropriate program for each such handicapped child.

The plaintiffs challenge this provision on the grounds that speech and hearing dianostic services, like the remedial services found to be unconstitutional in Meek, provide no guarantee that religious doctrine will not become intertwined with secular services. Plaintiffs apparently believe that this conclusion necessarily results from the personal communication that must take place between the diagnostic speech and hearing specialist and the nonpublic school child.

While this Court agrees with plaintiffs that communication must almost inevitably take place when a child's speech and hearing abilities are tested, this Court disagrees with plaintiffs that such communication presents the dangers envisioned by them. To say that health services -- which the Supreme Court has consistently held to be within the realm of permissible state aid -- must be conducted in silence in order to meet all constitutional objections strikes this Court as beyond the reach of reason. Plaintiffs make no challenge to the provision of medical, dental, nursing or orthopedic services to pupils attending nonpublic schools, yet oral communication between

those persons providing such services and the nonpublic pupil takes place just as certainly as it takes place during the process of speech and hearing diagnosis.

This Court is therefore of the opinion that the statute is constitutional insofar as it authorizes the provision of speech and hearing diagnosis to take place on the premises of the nonpublic school.

3. Diagnostic psychological services. The functions of the diagnostic psychological staff include identification through recognized professional methods of children suffering from psychological problems, and referral of children requiring treatment to the therapeutic psychological staff for treatment off the premises of the nonpublic school. Plaintiffs challenge this program, arguing that such services give rise to at least the same objections as did the remedial programs held unconstitutional in Meek.

It is, no doubt, true that psychological diagnosis may involve an element of subjectivity not necessarily involved in speech and hearing diagnosis or in other medical services, yet this Court perceives a significant distinction between psychological diagnosis and psychological treatment. Psychological treatment would ideally involve an ongoing relationship with the particular child and would attempt to deal with the child in the context of his entire environment, including his educational environment, thus giving rise to the dangers articulated in Meek. Psychological diagnosis, on the other hand,



requires only relatively limited contact with the child, and the procedures employed during such contact are more easily governed by objective and professional testing methods directed, not toward the ultimate rehabilitation of the child, but toward isolating professionally recognized symptoms.

The Supreme Court in Meek addressed itself to the problems raised by the presence of personnel whose functions were perceived to be essentially pedagogical. The danger arising from the presence of teachers in the nonpublic environment stems from the nature of the functions performed by those teachers:

> In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.

Lemon v. Kurtzman, supra, 403 U.S. at 617. Diagnostic services differ markedly from teaching services in that the ongoing and at times unpredictable communication between the pupil and the teacher is not present in the diagnostic process directed toward the isolation of particular professionally recognized symptoms of physical or mental difficulties present in a child.

Accordingly, in the view of this Court, the primary beneficiaries of such programs are the children attending the nonpublic schools and the objections perceived by the Supreme Court in Meek as presented by the remedial programs authorized by the Pennsylvania legislation are not presented by Ohio's programs

authorizing only narrow forms of health diagnosis and services. Such programs do not present the necessity for entangling supervision of the personnel providing the services since, by virtue of the nature of such services, there exists no real likelihood that the professional staff providing such services will advance the religious mission of the schools in which they serve.

D. Therapeutic and Remedial Services

Section 3317.06(G), (H), (I) and (K) O.R.C. authorizes the provision of therapeutic psychological, speech and hearing services, guidance and counseling services, remedial services and programs for deaf, blind, emotionally disturbed, crippled and physically handicapped children attending nonpublic schools. Such services are to be provided off the nonpublic school premises and in public schools, public centers or in mobile units, as determined by the state department of education. Further, personnel providing such services would be employees of the local board of education or under contract with the state department of health. According to the stipulations of the parties, the determination of the precise location of such services would depend upon such factors as distance, transportation safety and adequacy of accommodations in public schools and centers. Finally, the statute authorizes transportation to public schools or centers when necessary.

The stipulations define "public center" to include libraries, public meeting halls,



firehouses, or recreation centers. It is further expected that when such services are provided in mobile units parked off nonpublic school premises, pupils requiring the services authorized by the statute will be treated on an individual basis or with a small group of students having similar problems.

Nonpublic school personnel will be involved in the operation of the programs only insofar as it is necessary to coordinate scheduling and, in some instances, to identify the children in need of such specialized services.

The Supreme Court in Meek characterized the nature of the duties of the professionals administering these remedial and rehabilitive services to nonpublic schoolchildren as essentially pedagogical and therefore susceptible to religious influence when conducted in the nonpublic schools. Section 3317.06 O.R.C. therefore authorizes the provision of these remedial services to nonpublic schoolchildren only off the premises of the nonpublic schools.

Plaintiffs argue that this section of the statute fails to meet the constitutional test of validity in that, although the statute requires that the services be provided off the nonpublic premises, there is no assurance that either the public centers or the mobile units will be truly disassociated from the nonpublic schools. Plaintiffs envision creation of "public centers" in name only but in reality created and conducted solely for the benefit of a parochial constituency.

As this Court views the legislative program, the statute authorizes the provision of

remedial and therapeutic services within the public schools -- presumably the same physical location of similar services provided to public schoolchildren. However, recognizing that the physical logistics of transporting and servicing nonpublic schoolchildren may, in some instances, preclude the provision of those services in the public schools, the General Assembly has, wisely, given to the state department of education the flexibility necessary in making these services available to all nonpublic schoolchildren under all circumstances. Yet the clear import of the statute on its face is that such services are to take place on sites neither physically nor educationally identified with the functions of the nonpublic school. Just as the statute provides no authorization for the construction of buildings, the statute on its face provides no authority for the creation of centers or mobile units public in name and financing but private in every other substantive respect.

Plaintiffs further argue that because it is anticipated that mobile units will serve only nonpublic schoolchildren when so assigned and because public centers could conceivably be made available to nonpublic schoolchildren for purposes different from those for which the center is made available to public schoolchildren, a direct aid to religion is the necessary result of the operation of the statute. In this argument plaintiffs are splitting a very fine hair.

In the view of this Court, a requirement that the facilities in which remedial and therapeutic services are provided to nonpublic



schoolchildren must remain -- both formally as well as substantively -- public facilities, does not require that those facilities be used at all times and under all circumstances in precisely the same manner with respect to both public and nonpublic schoolchildren. Most public school pupils are provided remedial and therapeutic services by the state in the school which they attend. Once it is recognized, which it must be, that the public schools may not under all circumstances be available to nonpublic schoolchildren for remedial and therapeutic services, it must be recognized that if nonpublic schoolchildren are to receive such services at all, those services will under some circumstances be made available to them in a manner not precisely identical to that in which public schoolchildren receive such services.[6]

The Court also notes that, according to the stipulations of the parties, it is anciicipated that personnel providing therapeutic and remedial services will, under some circumstances, be required to deal with the child's regular classroom teachers. Such an arrangement raises, at first glance, the specter of entanglement that could prove fatal to the programs. However, because the services are to be provided outside the nonpublic school, it cannot be said that the religious atmosphere

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[6]In Wheeler v. Barrera, 417 U.S. 402 (1974) the Supreme Court seemed to imply by way of dictum that states may provide to nonpublic schoolchildren services that are comparable, although not identical, to those provided to public schoolchildren.

of the nonpublic school will foster the risk of even unconscious injection of religion into the services found to be objectionable in Meek. Thus there exists no need for entangling supervision in order to ensure that the remedial and therapeutic personnel do not advance the religious mission of the schools attended by the nonpublic schoolchildren served.

Further, and perhaps more importantly, if any such remedial and therapeutic service is ever to be effective, it should ideally serve the child in the context of his total environment, including his educational environment. Thus, to say that such services are unconstitutional because the personnel providing such services must encounter the child's nonpublic school teacher is to say that nonpublic schoolchildren may never receive effective state supported remedial and therapeutic services.

The Supreme Court in Meek did not question the state's authority to provide such aid to its young citizens, but found objectionable only the mechanics of the Pennsylvania statute, whereby the services were to be provided in the nonpublic school. Ohio's statute removes those services from the nonpublic school's "atmosphere dedicated to the advancement of religious belief" and this Court concludes that Ohio's remedial and therapeutic programs meet the constitutional objections articulated in Meek. The primary beneficiaries of the programs are unquestionably the children who are in need of such services and the administration of the program is not likely to foster an excessive governmental entanglement with the nonpublic schools attended by those children.



E. Standardized Testing and Scoring Services

Section 3317.06(J) O.R.C. authorizes the local school districts throughout the State of Ohio to supply for use by nonpublic schoolchildren within the district such standardized tests and scoring services as are in use in the public schools of the state. Such tests, according to the stipulations provided by the parties, are used to measure the progress of all students in secular subjects.

The Supreme Court in Levitt v. Committee for Public Education, 413 U.S. 472 (1973), held unconstitutional a New York statute authorizing reimbursement to nonpublic schools for such state mandated services as the maintenance of a regular program of traditional internal testing. The Court, through Mr. Chief Justice Burger, perceived in the program the risk that "these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." 413 U.S. at 480 [emphasis supplied].[7]

Unlike the testing program invalidated in Levitt, the program authorized by the Ohio

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[7]The Court in Levitt also noted that the New York statute provided direct money grants to nonpublic schools, yet provided no means of assuring that the money would not be used for sectarian, as opposed to secular, purposes. 413 U.S. at 477.

statute does not involve tests prepared by nonpublic school teachers, and therefore cannot result in the danger of inadvertant religious indoctrination. Rather, the Ohio statute authorizes the provision of only those same tests and scoring services as are provided in the public schools of the local district. The content of such tests, then, is necessarily and without further precaution restricted to the secular content of the state-required secular courses taught in the nonpublic schools. Since nonpublic school personnel are involved in neither the substantive drafting of the tests nor in the scoring of those tests, there is no possibility of inadvertant injection of religious doctrine in the administration of the tests. Likewise, because nonpublic school personnel will be involved only ministerially in the administration of the tests, the program will not foster an excessive entangling relationship between the state and the church-related school.

This Court is therefore of the opinion that the testing and scoring services authorized by the statute are constitutional.

F. Field Trip Transportation

Section 3317.06(L) O.R.C. authorizes the local public school districts to provide to nonpublic schoolchildren such field trip transportation and services as are provided to public school students within the district. The statute further authorizes the local school districts to contract with commercial transportation companies for the service if school district buses are unavailable. The stipulations of the parties indicate that, under the



statute, transportation would be provided for student visits to governmental, industrial, cultural and scientific centers designed to enrich the secular studies of nonpublic schoolchildren.

Plaintiffs argue that to the extent that field trip transportation relates to specific aspects of the parochial school's educational programs, the program cannot withstand constitutional scrutiny.

The Supreme Court in Everson v. Board of Education, 330 U.S. 1 (1947), upheld a New Jersey statute providing bus transportation to nonpublic schoolchildren, although the Court recognized that the state's provision of such services may have facilitated attendance at nonpublic schools. 330 U.S. at 17. The incidental benefit to the nonpublic schools was thought in that case not to render the program unconstitutional. This Court is unable to distinguish in a significant manner the constitutional provision to nonpublic schoolchildren of bus transportation on a daily basis from the provision of transportation on an occasional basis. Both may be seen to confer an indirect benefit upon the nonpublic school in the sense that the statute may render attendance at the nonpublic school somewhat more attractive to certain parents, but that indirect benefit upon the nonpublic school was not held to be determinative of the constitutionality of such programs in Everson.

Further, the administrative entanglement between public and nonpublic personnel

would not be significantly greater under the Ohio field trip program than under the program upheld in Everson, since only simple scheduling of the transportation services would be required. Because the statute specifically authorizes the local public schools to contract for transportation services where necessary to accomodate all scheduled field trips, this Court can perceive no danger that scheduling conflicts would pressure the public schools into subordinating their program schedules to accommodate those of the nonpublic schools.

This Court therefore concludes that the field trip transportation program authorized by §3317.06(L) O.R.C. is constitutional.

V

This Court concludes that §3317.06 O.R.C. is on its face constitutional. The principal or primary effect of the statute is to make available to all students within the State of Ohio, both public and nonpublic, certain limited and inherently secular services and materials. Likewise, this Court does not believe that the statute will foster excessive governmental entanglement, either administrative or political. The amount of aid appropriated by the Ohio General Assembly to effectuate all of the programs authorized by §3317.06 O.R.C. is substantial, averaging approximately $176.00 per nonpublic pupil per year. But because this Court can perceive no substantive constitutional objection to either the nature or the form of the programs authorized, this Court can perceive no constitutionally significant



distinction between a little bit of secular aid and a lot of secular aid. The statute authorizes no transfer of money to the nonpublic schools and the guidelines promulgated for the implementation of the program provide that funds unencumbered and unexpended for the authorized purposes at the close of the second year of the biennium are to be returned to the state treasurer. Surely, if the quality of the aid extended by the state to its citizens presents no constitutional objection, then the quantity of that aid must be likewise unobjectionable.

Finally, although the programs authorized by the statute are dependent upon periodic appropriations, it is the conclusion of this Court that the potentially divisive political effect of the programs is minimal. The statute on its face provides services and materials to students attending nonpublic schools only to the extent that those services and materials are already available to children attending public schools. Additionally, the services and materials provided to students in nonpublic schools cannot exceed in cost or quality the services provided to students attending public schools. Therefore, this statute merely extends already existing programs to all students in Ohio. Since the services and materials provided under the statute may not exceed in cost or quality those provided to public schoolchildren, any political debate would, in the view of this Court, most likely relate to the need for and the merits of providing such services and materials to pupils in general rather than to those attending nonpublic schools in particular.

## STATUTE INVOLVED

Ohio Revised Code §3317.06

[as enacted in

Amended Substitute Senate Bill 170

(SB 170)]

*** *** ***

**Sec. 3317.06. MONEYS PAID TO SCHOOL DISTRICTS UNDER DIVISION (P) OF SECTION 3317.024 OF THE REVISED CODE SHALL BE USED FOR THE FOLLOWING INDEPENDENT AND FULLY SEVERABLE PURPOSES:**

**(A) TO PURCHASE SUCH SECULAR TEXTBOOKS AS HAVE BEEN APPROVED BY THE SUPERINTENDENT OF PUBLIC INSTRUCTION FOR USE IN PUBLIC SCHOOLS IN THE STATE AND TO LOAN SUCH TEXTBOOKS TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT OR TO THEIR PARENTS. SUCH LOANS SHALL BE BASED**



**UPON INDIVIDUAL REQUESTS SUBMITTED BY SUCH NONPUBLIC SCHOOL PUPILS OR PARENTS. SUCH REQUESTS SHALL BE SUBMITTED TO THE LOCAL PUBLIC SCHOOL DISTRICT IN WHICH THE NONPUBLIC SCHOOL IS LOCATED. SUCH INDIVIDUAL REQUESTS FOR THE LOAN OF TEXTBOOKS SHALL, FOR ADMINISTRATIVE CONVENIENCE, BE SUBMITTED BY THE NONPUBLIC SCHOOL PUPIL OR HIS PARENT TO THE NONPUBLIC SCHOOL WHICH SHALL PREPARE AND SUBMIT COLLECTIVE SUMMARIES OF THE INDIVIDUAL REQUESTS TO THE LOCAL PUBLIC SCHOOL DISTRICT. AS USED IN THIS SECTION, "TEXTBOOK" MEANS ANY BOOK OR BOOK SUBSTITUTE WHICH A PUPIL USES AS A TEXT OR TEXT SUBSTITUTE IN A PARTICULAR CLASS OR PROGRAM IN THE SCHOOL HE REGULARLY ATTENDS.**

**(B) TO PURCHASE AND TO LOAN TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT OR TO THEIR PARENTS UPON INDIVIDUAL REQUEST, SUCH SECULAR, NEUTRAL AND NONIDEOLOGICAL INSTRUCTIONAL MATERIALS AS ARE IN USE IN THE PUBLIC SCHOOLS WITHIN THE DISTRICT AND WHICH ARE INCAPABLE OF DIVERSION TO RELIGIOUS USE AND TO HIRE CLERICAL PERSONNEL TO ADMINISTER SUCH LENDING PROGRAM.**

**(C) TO PURCHASE AND TO LOAN TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT OR TO THEIR PARENTS, UPON INDIVIDUAL REQUEST, SUCH SECULAR, NEUTRAL AND NONIDEOLOGICAL INSTRUCTIONAL EQUIPMENT AS IS IN USE IN THE PUBLIC SCHOOL WITHIN THE DISTRICT AND WHICH IS INCAPABLE OF DIVERSION TO RELIGIOUS USE AND TO HIRE CLERICAL PERSONNEL TO ADMINISTER SUCH LENDING PROGRAM.**

**(D) TO PROVIDE SPEECH AND HEARING DIAGNOSTIC SERVICES TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT. SUCH SERVICE SHALL BE PROVIDED IN THE NONPUBLIC SCHOOL ATTENDED BY THE PUPIL RECEIVING THE SERVICE.**

**(E) TO PROVIDE PHYSICIAN, NURSING, DENTAL, AND OPTOMETRIC SERVICES TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT. SUCH SERVICES SHALL BE PROVIDED IN THE SCHOOL ATTENDED BY THE NONPUBLIC SCHOOL PUPIL RECEIVING THE SERVICE.**

**(F) TO PROVIDE DIAGNOSTIC PSYCHOLOGICAL SERVICES TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT. SUCH SERVICES SHALL BE PROVIDED IN THE SCHOOL ATTENDED BY THE PUPIL RECEIVING THE SERVICE.**

**(G) TO PROVIDE THERAPEUTIC PSYCHOLOGICAL AND SPEECH AND HEARING SERVICES TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT.**

SUCH SERVICES SHALL BE PROVIDED IN THE PUBLIC SCHOOL, IN PUBLIC CENTERS, OR IN MOBILE UNITS LOCATED OFF OF THE NONPUBLIC PREMISES AS DETERMINED BY THE STATE DEPARTMENT OF EDUCATION. IF SUCH SERVICES ARE PROVIDED IN THE PUBLIC SCHOOL OR IN PUBLIC CENTERS, TRANSPORTATION TO AND FROM SUCH FACILITIES SHALL BE PROVIDED BY THE PUBLIC SCHOOL DISTRICT IN WHICH THE NONPUBLIC SCHOOL IS LOCATED.

(H) TO PROVIDE GUIDANCE AND COUNSELING SERVICES TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT. SUCH SERVICES SHALL BE PROVIDED IN THE PUBLIC SCHOOL, IN PUBLIC CENTERS, OR IN MOBILE UNITS LOCATED OFF OF THE NONPUBLIC PREMISES AS DETERMINED BY THE STATE DEPARTMENT OF EDUCATION. IF SUCH SERVICES ARE PROVIDED IN THE PUBLIC SCHOOL OR IN PUBLIC CENTERS, TRANSPORTATION TO AND FROM SUCH FACILITIES SHALL BE PROVIDED BY THE PUBLIC SCHOOL DISTRICT IN WHICH THE NONPUBLIC SCHOOL IS LOCATED.

(I) TO PROVIDE REMEDIAL SERVICES TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT. SUCH SERVICES SHALL BE PROVIDED IN THE PUBLIC SCHOOL, IN PUBLIC CENTERS, OR IN MOBILE UNITS LOCATED OFF OF THE NONPUBLIC PREMISES AS DETERMINED BY THE STATE DEPARTMENT OF EDUCATION. IF SUCH SERVICES ARE PROVIDED IN THE PUBLIC SCHOOL OR IN PUBLIC CENTERS, TRANSPORTATION TO AND FROM SUCH FACILITIES SHALL BE PROVIDED BY THE PUBLIC SCHOOL DISTRICT IN WHICH THE NONPUBLIC SCHOOL IS LOCATED.

(J) TO SUPPLY FOR USE BY PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT SUCH STANDARDIZED TESTS AND SCORING SERVICES AS ARE IN USE IN THE PUBLIC SCHOOLS OF THE STATE.

(K) TO PROVIDE PROGRAMS FOR THE DEAF, BLIND, EMOTIONALLY DISTURBED, CRIPPLED, AND PHYSICALLY HANDICAPPED CHILDREN ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT. SUCH SERVICES SHALL BE PROVIDED IN THE PUBLIC SCHOOL, IN PUBLIC CENTERS, OR IN MOBILE UNITS LOCATED OFF OF THE NONPUBLIC PREMISES AS DETERMINED BY THE STATE DEPARTMENT OF EDUCATION. IF SUCH SERVICES ARE PROVIDED IN THE PUBLIC SCHOOL OR IN PUBLIC CENTERS, TRANSPORTATION TO AND FROM SUCH FACILITIES SHALL BE PROVIDED BY THE PUBLIC SCHOOL DISTRICT IN WHICH THE NONPUBLIC SCHOOL IS LOCATED.

(L) TO PROVIDE SUCH FIELD TRIP TRANSPORTATION



AND SERVICES TO NONPUBLIC SCHOOL STUDENTS AS ARE PROVIDED TO PUBLIC SCHOOL STUDENTS IN THE DISTRICT. SCHOOL DISTRICTS MAY CONTRACT WITH COMMERCIAL TRANSPORTATION COMPANIES FOR SUCH TRANSPORTATION SERVICE IF SCHOOL DISTRICT BUSSES ARE UNAVAILABLE.

HEALTH SERVICES PROVIDED PURSUANT TO DIVISIONS (D), (E), (F), AND (G) OF THIS SECTION MAY BE PROVIDED UNDER CONTRACT WITH THE STATE DEPARTMENT OF PUBLIC HEALTH.

TRANSPORTATION OF PUPILS PROVIDED PURSUANT TO DIVISIONS (G), (H), (I), AND (K) OF THIS SECTION SHALL BE PROVIDED BY THE PUBLIC SCHOOL DISTRICT FROM ITS GENERAL FUNDS AND NOT FROM MONEYS PAID TO IT UNDER DIVISION (P) OF SECTION 3317.024 OF THE REVISED CODE.

THE DUTIES OF CLERICAL PERSONNEL, HIRED PURSUANT TO DIVISIONS (B) AND (C) OF THIS SECTION, SHALL INCLUDE DISTRIBUTION OF LOAN REQUEST FORMS, RECEIPT AND CATALOGING OF LOAN REQUESTS, INVENTORY OF INSTRUCTIONAL MATERIALS AND INSTRUCTIONAL EQUIPMENT, DISTRIBUTION OF INSTRUCTIONAL MATERIALS AND INSTRUCTIONAL EQUIPMENT TO PUPILS OR THEIR PARENTS, RETRIEVAL OF SUCH INSTRUCTIONAL MATERIALS AND INSTRUCTIONAL EQUIPMENT, AND MAINTAINING CUSTODY AND STORAGE OF THESE ITEMS. THE INSTRUCTIONAL MATERIAL AND INSTRUCTIONAL EQUIPMENT AUTHORIZED TO BE LOANED PURSUANT TO DIVISIONS (B) AND (C) OF THIS SECTION MAY BE STORED ON THE PREMISES OF THE NONPUBLIC SCHOOL OF ATTENDANCE AND THE CLERICAL PERSONNEL HIRED FOR ADMINISTRATION OF THE LENDING PROGRAM MAY PERFORM THEIR SERVICES UPON THE PREMISES OF THE NONPUBLIC SCHOOL WHEN IN THE DETERMINATION OF THE STATE DEPARTMENT OF EDUCATION, IT IS NECESSARY AND APPROPRIATE FOR EFFICIENT IMPLEMENTATION OF THE LENDING PROGRAM.

NO SCHOOL DISTRICT SHALL PROVIDE HEALTH OR REMEDIAL SERVICES TO NONPUBLIC SCHOOL PUPILS AS AUTHORIZED BY THIS SECTION UNLESS SUCH SERVICES ARE AVAILABLE TO PUPILS ATTENDING THE PUBLIC SCHOOLS WITHIN THE DISTRICT.

HEALTH AND REMEDIAL SERVICES AND INSTRUCTIONAL MATERIALS AND EQUIPMENT PROVIDED FOR THE BENEFIT OF NONPUBLIC SCHOOL PUPILS PURSUANT TO THIS SECTION AND THE ADMISSION OF PUPILS TO SUCH NONPUBLIC SCHOOLS SHALL BE PROVIDED WITHOUT DISTINCTION AS TO RACE, CREED, COLOR, OR NATIONAL ORIGIN OF SUCH PUPILS OR OF THEIR TEACHERS. NO IN-

STRUCTIONAL MATERIALS OR INSTRUCTIONAL EQUIPMENT SHALL BE LOANED TO PUPILS IN NONPUBLIC SCHOOLS OR THEIR PARENTS UNLESS SIMILAR INSTRUCTIONAL MATERIALS OR INSTRUCTIONAL EQUIPMENT ARE AVAILABLE FOR PUPILS IN THE PUBLIC SCHOOLS OF THE SCHOOL DISTRICT.

NO SCHOOL DISTRICT SHALL PROVIDE SERVICES, MATERIALS, OR EQUIPMENT FOR USE IN RELIGIOUS COURSES, DEVOTIONAL EXERCISES, RELIGIOUS TRAINING, OR ANY OTHER RELIGIOUS ACTIVITY.

AS USED IN THIS SECTION, "PARENT" INCLUDES A PERSON STANDING IN LOCO PARENTIS TO A CHILD.

NOTWITHSTANDING SECTION 3317.01 OF THE REVISED CODE, PAYMENTS SHALL BE MADE UNDER THIS SECTION TO ANY CITY, LOCAL, OR EXEMPTED VILLAGE SCHOOL DISTRICT WITHIN WHICH IS LOCATED ONE OR MORE NONPUBLIC ELEMENTARY OR HIGH SCHOOLS.

THE ALLOCATION OF PAYMENTS FOR TEXTBOOKS, INSTRUCTIONAL MATERIALS, INSTRUCTIONAL EQUIPMENT, HEALTH SERVICES, AND REMEDIAL SERVICES TO CITY, LOCAL, AND EXEMPTED VILLAGE SCHOOL DISTRICTS SHALL BE ON THE BASIS OF THE STATE BOARD OF EDUCATION'S ESTIMATED ANNUAL AVERAGE DAILY MEMBERSHIP IN NONPUBLIC ELEMENTARY AND HIGH SCHOOLS LOCATED IN THE DISTRICT.

PAYMENTS MADE TO CITY, LOCAL, AND EXEMPTED VILLAGE SCHOOL DISTRICTS UNDER THIS SECTION SHALL BE EQUAL TO SPECIFIC APPROPRIATIONS MADE FOR THE PURPOSE.

THE STATE DEPARTMENT OF EDUCATION MAY ADOPT GUIDELINES AND PROCEDURES UNDER WHICH SUCH PROGRAMS AND SERVICES SHALL BE PROVIDED AND UNDER WHICH DISTRICTS SHALL BE REIMBURSED FOR ADMINISTRATIVE COSTS INCURRED IN PROVIDING SUCH PROGRAMS AND SERVICES.

FUNDS DISTRIBUTED PURSUANT TO THIS SECTION SHALL NOT EXCEED SPECIFIC APPROPRIATIONS MADE THEREFOR BY THE GENERAL ASSEMBLY, UNLESS EXPRESSLY APPROVED BY THE EMERGENCY BOARD OR THE CONTROLLING BOARD.

[End of §3317.06]



NOTICE OF APPEAL

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C-2-75-792

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BENSON A. WOLMAN, et al,

Plaintiffs,

-vs.-

MARTIN W. ESSEX, et al,

Defendants.

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Notice is hereby given that Benson A. Wolman, Frederick Chambers, Patricia J. Keenan, Barbara Kaye Besser, Nancy R. Terjesen and Marjorie Wright, plaintiffs herein, hereby appeal to the Supreme Court of the United States from the final judgment and order declaring Ohio Revised Code Section 3317.06 to be constitutional, refusing to enjoin said statute and dismissing the complaint, entered in this action on July 21,1976.

This appeal is taken pursuant to Title 28, United States Code Section 1253.

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# APPENDIX

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-496**

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BENSON A. WOLMAN, *et al.*,

*Appellants,*

—v.—

MARTIN W. ESSEX, *et al.*,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

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**FILED OCTOBER 7, 1976**

**PROBABLE JURISDICTION NOTED JANUARY 10, 1977**

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-496

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BENSON A. WOLMAN, ET AL.,

Appellants,

-v.-

MARTIN W. ESSEX, ET AL.,

Appellees.

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO

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# DOCKET ENTRIES

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 11-18-75 | 1 | Complaint filed. |
| 11-18-75 | 2 | Civil cover sheet filed. |
| 11-18-75 | 3 | Praecipe filed. |
| 11-18-75 | 4 | Motion for pre inj filed. |
| 11-21-75 | 5 | Marshal's return filed, served Gertrude Donahey on 11-20-75. $3.00 served Ferguson, Feigenbaum, Grit, Koloski, Kane, Board of Education, Essex, and State Board on 11-18-75. $24.00 |
| 11-28-75 | 6 | Memo contra motion for prel inj filed by defts. |
| 12-05-75 | 7 | Memo of defts in opposition to motion for prel inj filed. |
| 12-09-75 | 8 | Answer of defts filed. |
| 12-10-75 | 9 | Motion for TRO filed, memo attached. |
| 12-10-75 | 10 | TEMPORARY RESTRAINING ORDER filed. (cert cc counsel for service.) |
| 12-10-75 | 11 | Praecipe filed. re for service of the TRO by counsel. |
| 12-11-75 | 12 | Opinion filed: Judge Kinneary requests a Three Judge Court. (cmt Wolman/Ellis/Young/ Phillips). |
| 12-11-75 | 13 | Notification and certification filed. re for Three Judge Court. (cmt Wolman/Ellis/ Young/Judge Phillips). |
| 12-16-75 | 14 | Affidavit of service filed. re of the TRO. |

| | | |
|---|---|---|
| 12-12-75 | 15 | DESIGNATION FILED, this is to be decided by Three Judge Court (cmt count Judges). |
| 01-16-76 | 16 | Answer of defts, Grit, Kane, Koloski and Shane filed. |
| 01-20-76 | 17 | Consent order filed: Alvin Shames is to be added in substitution for Mrs. Hanna Feigenbaum, and Mrs. Hanna Feigenbaum is dismissed as a party (cmt Wolman/Ellis/Young/ Judges). |
| 01-27-76 | | Letter from David J. Young, to the Honorable Judge Joseph P. Kinneary made a part of the record. |
| 02-13-76 | 18 | Consent order filed. re modification of TRO issued 12-10-75. (cmt counsel/Judges). |
| 03-16-76 | 19 | Stipulation of facts filed. |
| 04-02-76 | 20 | Brief of defendants Martin W. Essex, State Board of Education, Gertrude W. Donahey, Thomas E. Ferguson and Board of Education of the City School Dist. of Columbus, Ohio, filed. |
| 04-05-76 | 21 | Trial Memorandum of nonpublic school defendants, filed. |
| 04-05-76 | 22 | Brief of the Ohio Free Schools Association as amicus curiae, filed. |
| 04-05-76 | 23 | Brief of Plaintiffs, filed. |
| 05-17-76 | 24 | Exhibits A tru. D. to stipulation of facts, filed. |
| 05-19-76 | 25 | Amended Disignation--Three Judge Court--Hon. John W. Peck, Judge, U.S. Court of Appeals for the Sixth Circuit, Hon. Joseph P. Kinneary, Judge, U.S. District Court and Hon. Robert M. Duncan, Judge, U.S. District |



| | | |
|---|---|---|
| | | Court, filed. Copy to three Judges and counsel. |
| 06-01-76 | | Note: Trial on the merits before three Judge Panel had. |
| 06-10-76 | 26 | Plaintiffs post hearing memo, filed. |
| 06-11-76 | 26A | Non Public School Parent Def'ts. Post. Hearing Memo., filed. |
| 07-21-76 | 27 | Opinion, filed. |
| 07-21-76 | 28 | Order, filed. Section 3317.06 of the O.R.C. is constitutional and plaintiffs' complaint is without merit. This action is dismissed. |
| 07-21-76 | 29 | Judgment, filed. Section 3317.06 of the ORC is constitutional and plaintiffs' complaint is without merit. This action is dismissed. CMT Kancelbaum, Ellis, David Young and Martin. (cmt to all judges) |
| 07-28-76 | 30 | Motion for continuation of injunction pending appeal, filed. |
| 08-02-76 | 31 | Memo contra motion for injunction pending appeal filed. |
| 08-05-76 | 32 | Order filed: the Court declines to reinstate the injuction entered by this Court prior to the determination on the merits of the issue presented in this case. (cmt Judges/counsel). |
| 08-06-76 | 33 | Memo of state defts, in opposition to motion for injunction pending appeal. |
| 08-10-76 | 34 | Plaintiffs notice of appeal, filed. cmt all counsel. |
| 08-10-76 | 35 | Request for certification and transmittal of the record, filed. |
| 09-19-76 | | Record Certified to U.S. Supreme Court. |

[filed November 18, 1975]
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BENSON A. WOLMAN
3107 Midgard Road
Columbus, Ohio 43202

FREDRICK CHAMBERS
2010 Carlton Drive
Kent, Ohio 44240

PATRICIA J. KEENAN
1308-B Woodbrook Lane
Columbus, Ohio 43223

BARBARA KAYE BESSER
3554 Stoer Road
Shaker Heights, Ohio
44122

NANCY R. TERJESEN
4530 Sunnybrook Road
Brimfield, Ohio 44240

MARJORIE WRIGHT
6285 Vista Ridge Lane
Cincinnati, Ohio 45227,

Plaintiffs,

-vs-

CIVIL ACTION
NO. C-2-75-792

COMPLAINT



MARTIN W. ESSEX, SUPERINTENDENT
OF PUBLIC INSTRUCTION OF THE
STATE OF OHIO
65 South Front Street, Room 808
Columbus, Ohio 43215

STATE BOARD OF EDUCATION
c/o MARTIN W. ESSEX, SECRETARY
65 South Front Street, Room 808
Columbus, Ohio 43215

GERTRUDE W. DONAHEY
Treasurer of the State of Ohio
State Office Tower
Columbus, Ohio 43215

THOMAS E. FERGUSON
Auditor of the State of Ohio
88 East Broad Street
Columbus, Ohio 43215

BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF COLUMBUS,
OHIO
c/o WILLIAM GUY, Clerk
270 East State Street
Columbus, Ohio 43215

and

MRS. HANNA FEIGENBAUM
MR. JAMES GRIT
MR. EWALD KANE
MRS. HELEN S. KOLOSKI
through their attorney
DAVID J. YOUNG
250 East Broad Street
Columbus, Ohio 43215,

Defendants.

## C O M P L A I N T

Jurisdiction.

1. Plaintiffs are citizens and taxpayers of the United States and the State of Ohio who bring this action for preliminary and permanent injunctions against the use of funds of the State of Ohio in a manner having the primary effect of advancing religion and fostering excessive entanglement between the State government and religious institutions in violation of the First and Fourteenth Amendments of the United States Constitution, and for a declaration that the State statute authorizing the expenditure of said funds violates said Amendments of the United States Constitution. Jurisdiction is conferred upon this Court by 28 U.S.C. §1331, this being a suit wherein the matter incontroversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, arising under the Constitution of the United States.

2. Jurisdiction is also conferred upon this Court by 28 U.S.C. §§1343(3) and 2201 and 42 U.S.C. §1983, this being a suit for declaratory and equitable relief authorized by law to be commenced by a citizen of the United States to redress deprivations under color of state law of rights, privileges and immunities secured by the Constitution and laws of the United States.

Defendants.

3.(a) Defendant Martin W. Essex is the duly appointed and acting Superintendent of



Public Instruction of the State of Ohio and, as such, is the secretary and chief executive and administrative officer of the State Board of Education of Ohio and the Chief Administrative Officer of the State Department of Education of the State of Ohio. Defendant Essex and the agencies mentioned of which he is the chief officer are charged by law with the implementation of the Ohio statute herein challenged.

(b) Defendants Gertrude W. Donahey and Joseph T. Ferguson are respectively the duly elected Treasurer and Auditor of the State of Ohio and are charged by Ohio Law with making and approving the disbursement of public funds of the State of Ohio for the unconstitutional purposes under the Ohio Statute herein challenged.

(c) Defendant Mrs. Hanna Feigenbaum is the mother and next friend of a child enrolled in the Columbus Torah Academy (Columbus, Ohio), a sectarian institution which is a potential recipient, and whose students are potential recipients, of services, materials, or other benefits as provided in Section 3317.06 of the Ohio Revised Code (referred to in paragraph 4 et seq.); defendant Mr. James Grit is the father and next friend of a child enrolled in Celeryville Christian School (Willard, Ohio), a sectarian institution which is a potential recipient, and whose students are potential recipients, of services, materials, or other benefits as provided in Section 3317.06 of the Ohio Revised Code; defendant Mr. Ewald Kane is the father and next friend of a child enrolled in St. Paul Lutheran School (Westlake, Ohio), a sectarian institution which is a potential

recipient, and whose students are potential recipients, of services, materials, or other benefits as provided in Section 3317.06 of the Ohio Revised Code; and defendant Mrs. Helen S. Koloski is the mother and next friend of a child enrolled in Immaculate Conception (Columbus, Ohio), a sectarian institution which is a potential recipient, and whose students are potential recipients, of services, materials, or other benefits as provided in Section 3317.06 of the Ohio Revised Code. Defendants Feigenbaum, Grit, Kane and Koloski have indicated through their counsel, David J. Young, that they have litigable interests herein and, unless included as defendants, they will seek to be intervening defendants in this action; plaintiffs, having no objection to their inclusion, having been apprised by their counsel that there are no complicating factors, and seeking to expedite these proceedings, hereby includes them as party defendants at their request.

(d) The defendant Board of Education of the City School District of Columbus, Ohio, is the duly created body corporate and politic which owns and operates the public schools in said school district and which is required by the Ohio Statute herein challenged to use and administer the use of state funds within said school district for the religious purposes herein challenged as contrary to the First and Fourteenth Amendments.

Claims.

4. On August 29, 1975, the Governor of Ohio signed into law an Act of the General



Assembly known as Senate Bill 170, part of which is or will be codified as Section 3317.06 of the Ohio Revised Code (herein called the "Act"). A copy of the Act is attached to this complaint, marked Exhibit "A" and incorporated by reference as a part of this complaint.

5. As a part of the Act, as signed by the Governor, the sum of $44,400,000.00 previously appropriated for expenditure during each year of the Ohio fiscal biennium, 1975-76 and 1976-77, for the non-public programs pursuant to §3317.062 O.R.C. is reallocated to §3317.06 (which has been renumbered from 3317.062), hereinafter described.

6. The Governor has publicly asserted that the Act became effective as an appropriation measure immediately upon his signing it, and the Attorney General of Ohio has publicly rendered an opinion that such is the case; however, this assertion is being challenged in litigation (to which Plaintiffs are not parties) in the Common Pleas Court of Franklin County. If the Act is not an appropriation measure, it will become effective ninety days after it was signed into law. Thus, the Act is either presently in effect or will become effective in the immediate future.

7. The Act provides, in essence, that monies paid to the school districts from public funds shall be used for the following purposes for the benefit of non-public schools or their pupils:*/

*/ The description herein touches only the

(A) To purchase secular textbooks and to loan them to pupils attending non-public schools within the district or to their parents. As used in this section, the definition of textbook includes a "book substitute."

(B) To purchase and to loan to pupils attending non-public schools within the district or their parents "secular" instructional material which are incapable of diversion to religious purposes and to hire clerical personnel to administer the lending program.

(C) To purchase and to loan to pupils attending non-public schools within the district or their parents "secular" instructional equipment which is incapable of diversion to religious use and to hire clerical personnel to administer the lending program.

(D) To provide physician, nursing, dental and optometric services to pupils in the non-public schools.

(E) To provide diagnostic psychological services in the non-public schools.

(F) To provide therapeutic and speech and hearing services to pupils of non-public

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general character of the programs. The Act is set out in Exhibit "A" and no effort is made to quote or paraphrase all significant provisions. Subparagraphs designated by capital letters, such as ('A'), etc. refer to the similarly designated paragraphs of the Act.



schools, such services to be provided in public schools, public centers or in mobile units located off the non-public premises (and to provide transportation to and from the public schools or public centers).

(G) To provide guidance and counseling services to pupils of non-public schools, such services to be provided in public schools, public centers or in mobile units located off the non-public premises (and to provide transportation to and from the public schools or public centers).

(H) To provide remedial services to pupils attending non-public schools, such services to be provided in public schools, public centers or in mobile units located off the non-public premises (and to provide transportation to and from the public schools or public centers).

(I) To supply tests and scoring services for use by pupils attending non-public schools.

(J) To provide programs for the deaf, blind, emotionally disturbed, crippled and physically handicapped children attending non-public schools, such services to be provided in the public schools, in public centers or in mobile units located off the non-public premises (and to provide transportation to and from the public schools or public centers).

(K) To provide such field trip transportation and services to non-public school students as are provided to public school students in the district.

8. Other paragraphs of the Act include provisions for storage of loaned instructional material and equipment on the non-public school premises, and the performance of the duties of public clerical staff in the non-public premises when same is determined by the State Department of Education to be necessary and appropriate for efficient implementation of the lending program. Other provisions not paraphrased herein but appended as part of Exhibit "A" include various funding and administrative clauses and limitations, and authorize the State Department of Education to adopt guidelines and procedures for the administration of the programs and services contemplated by the Act, and for the reimbursement of the costs incurred.

9. On the 17th day of November, 1975, this Court declared Ohio's auxiliary services and materials contained in Ohio Rev. Code §3317.062 law unconstitutional as violative of the First and Fourteenth Amendments. The Act described above provides substantially the same services and materials as those invalidated by this Court in said previous litigation, and has appropriated substantially the same funds for this purpose.

10. The overwhelming majority of non-public schools in Ohio are parochial religious schools operated and maintained by religious institutions primarily for the furtherance of sectarian education, and such schools include in their curriculum sectarian courses, devotional exercises, and prayer. On information and belief, some of these non-public schools impose religious qualifications on student



admission and faculty appointments and promote pupil attendance at religious activities and adherence to the dogma of their particular denomination or faith. Most of the non-public schools in Ohio are an integral part of the religious mission of their sponsoring church, and have as a substantial part of their purposes the inculcation of religious ideas and values.

11. The Act has a primary effect of advancing religion and fostering a continuing and excessively intrusive relationship between state agencies and religious institutions. Further, the Act will factionalize the electorate along religious lines.

12. The Act is being, or about to be, administered and implemented by the Defendants and will continue to be implemented by them unless the relief herein demanded is granted. Such implementation of the Act is causing and will cause expenditure of State funds raised by taxation for financial aid to religion in a manner violative of the First and Fourteenth Amendments.

13. The Act, on its face and as applied, is a law respecting an establishment of religion which is prohibited by the First Amendment as made applicable to the States by the Fourteenth Amendment.

14. This suit involves a genuine case and controversy between the Plaintiffs and the Defendants.

15. Plaintiffs have no plain, speedy or adequate remedy at law for the violations of their rights described above, and will suffer irreparable injury unless the injunctions demanded are granted.

WHEREFORE, Plaintiffs demand

(a) preliminary injunctions against the expenditure of state funds under the Act; and

(b) upon final hearing and determination, that the preliminary injunctions be made permanent except to the extent that any severable provisions of the Act may appear constitutional; and

(c) a declaration that the Act violates the Establishment Clause of the First Amendment made applicable to the States through the Fourteenth Amendment; and

(d) an award of costs and reasonable attorneys' fees for this action; and

(e) such other relief as may appear necessary or appropriate including the costs of this action.

/s/ Joshua J. Kancelbaum
Joshua J. Kancelbaum
2121 The Illuminating Bldg.
Cleveland, Ohio 44113
(216) 781-5245

Clyde Ellis
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203 East Broad Street
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Of Counsel:

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Cleveland, Ohio 44113
(216) 241-3646

[Exhibit A. §3317.06 of the Ohio Revised Code, appears in the Appendix to the Jurisdictional Statement at pp. A34-A38.]

[filed December 9, 1975]
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BENSON A. WOLMAN, ET AL., :

Plaintiffs, :

v. : Civil Action No. C-2-75-792

MARTIN W. ESSEX, ET AL., : Judge Kinneary

Defendants. :

ANSWER OF DEFENDANTS MARTIN W. ESSEX, STATE BOARD OF EDUCATION, GERTRUDE W. DONAHEY, THOMAS E. FERGUSON, AND BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF COLUMBUS, OHIO

Defendants for their Answer to the Complaint filed herein state as follows:

1. Defendants, upon information and belief, admit that the plaintiffs are citizens and taxpayers of the United States and the State of Ohio.

2. Martin W. Essex is Superintendent of Public Instruction of the State of Ohio. Defendant Essex is secretary to the State Board of Education and the chief administrative officer of the Department of Education. The Department of Education has authority to adopt guidelines and procedures regarding the provision of programs and services under Section 3317.06, Ohio Revised Code, and the reimbursement of administrative costs.



3. Gertrude W. Donahey is Treasurer of Ohio. Defendant Donahey is the custodian of such state funds as are prescribed by law.

4. Thomas E. Ferguson is Auditor of Ohio. Defendant Ferguson is the chief accounting officer of the state. No money shall be drawn from the state treasury except on his warrant.

5. Defendants, upon information and belief, admit the allegations contained in paragraph 3(c) of the Complaint.

6. Defendants admit the allegations contained in paragraph 3(d) of the Complaint except for the characterization of the use of funds as being for religious purposes.

7. Defendants admit the allegations contained in paragraph 5 of the Complaint.

8. Am. Sub. H.B. No. 155, which was signed into law by the Governor on June 29, 1975 provides appropriation of $44,400.00, for auxiliary services for the fiscal years 1975-76 and 1976-77.

9. Section 1d of Article II of the Ohio Constitution provides that laws providing for appropriations for the current expenses of the state government and state institutions shall go into immediate effect. If Section 3317.06, supra, is an appropriation law within the meaning of the constitutional provision, it would go into effect immediately. If not it would go into effect 90 days after it was filed with the Secretary of State. The Attorney General has not issued his opinion concerning the effective date of the statute.

10. Plaintiffs have paraphrased and summarized the provisions of the statute in paragraphs 7 and 8 of the Complaint. Insofar as such a summary may constitute an interpretation of the meaning of the statute or conclusions of law, defendants deny the allegations.

11. Section 3317.062 of the Revised Code, which was found invalid by Order of this Court, filed November 17, 1975, was repealed by Am. Sub. S.B. No. 170 which was passed by the General Assembly on August 1, 1975 and filed with the Secretary of State on August 29, 1975. The Order recites that it is not intended to address or adjudicate the constitutionality of Senate Bill No. 170.

12. A substantial majority of the non-public schools in this state are sectarian. All of these schools are required to provide a secular education for their students equivalent to that provided in the public schools. The manner in which the denomination which operates the school. Generally, the school day is expanded and the additional time is used to provide religious instruction. No students attending a non-public school are eligible to receive benefits if their school imposes religious qualifications upon student admissions or faculty appointments.

13. Defendants deny each and every allegation contained in the Complaint which is not expressly admitted herein.

WHEREFORE, defendants having fully answered the allegations contained in the Complaint pray that said Complaint be dismissed.



Respectfully submitted,

WILLIAM J. BROWN
Attorney General

/s/ Thomas V. Martin
THOMAS V. MARTIN, Trial
Attorney, Assistant Attorney
General
State Office Tower
30 East Broad Street,
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Columbus, Ohio 43215
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/s/ Lawrence H. Braun
LAWRENCE H. BRAUN, Trial
Attorney, Attorney at Law,
Columbus Public Schools
270 East State Street
Columbus, Ohio 43215
(614) 225-2673

Attorneys for Defendants
Martin W. Essex, State Board
of Education, Gertrude W.
Donahey, Thomas E. Ferguson
and Board of Education of
the City School District of
Columbus, Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer of Defendants Martin W. Essex, State Board of Education, Gertrude W. Donahey, Thomas E. Ferguson, and Board of Education of the City School District of Columbus, Ohio was mailed this 9th day of December, 1975 to Joshua K. Kancelbaum, 2121 The Illuminating Building, Cleveland, Ohio 44113, Clyde Ellis and Stanley K. Laughlin, Jr., American Civil Liberties Union of Ohio Foundation, Inc., 203 East Broad Street, Columbus, Ohio 43215, Attorneys for Plaintiffs; and David J. Young, Dunbar, Kienzle, & Murphey, 250 East Broad Street, Columbus, Ohio 43215, Attorney for Defendants Feiganbaum, Grit, Kane & Koloski.

/s/ Thomas V. Martin
THOMAS V. MARTIN



[filed January 16, 1976]
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| Benson A. Wolman, et al., | : | |
| Plaintiffs, | : | Civil Action |
| v. | : | No. C-2-75-792 |
| Martin W. Essex, et al., | : | Judge Kinneary |
| Defendants. | : | |

ANSWER OF DEFENDANTS
GRIT, KANE, KOLOSKI, AND SHAMES

These defendants for their answer to the complaint admit, aver, and deny as follows:

First Defense

1. Upon information and belief admit that plaintiffs are citizens and taxpayers of the United States and of the State of Ohio.

2. Admit that Martin W. Essex is the duly appointed and acting superintendent of public instruction of the State of Ohio; the secretary and chief executive and administrative officer of the State Board of Education of Ohio; and the chief administrative officer of the State Department of Education.

3. Admit that Gertrude W. Donahey is Treasurer of Ohio and that Thomas E. Ferguson is Auditor of Ohio.

4. Admit the identity of the defendants described in paragraph 3(c) of the complaint (with the exception of the substitution of defendant Shames for defendant Feigenbaum) and the identity of the schools attended by their children. Admit that the schools averred in paragraph 3(c) of the complaint are administered by or in coordination with religious organizations. Deny that the schools alleged in paragraph 3(c) of the complaint are recipients or potential recipients of services, materials, or other benefits stipulated in Section 3317.06 of the Ohio Revised Code.

5. Admit that the Board of Education of the school district of Columbus, Ohio is the duly created body corporate and politic which operates the public schools in the Columbus school district.

6. Admit the averments stated in paragraph 4 of the complaint.

7. Admit that the majority of nonpublic schools in Ohio have religious affiliations and that some of such schools include in their curriculum in addition to the state required secular courses, sectarian courses, devotional exercises, and prayer. The secular education provided to students in nonpublic schools is equivalent in content and academic standards to the state-mandated education in public schools.

8. Admit that this Court entered the order pleaded in paragraph 9 but state that



such order was not intended to adjudicate the constitutionality of the legislation at issue herein.

Second Defense

9. Deny each and every allegation in the complaint not herein admitted to be true.

10. A failure to implement Section 3317.06 of the Ohio Revised Code insofar as it provides health and secular educational benefits to nonpublic school pupils in common with other school pupils in the State of Ohio would result in an infringement upon the rights of such pupils and their parents to a free exercise of religion contrary to the First and Fourteenth Amendments of the United States Constitution.

WHEREFORE, these defendants demand that the complaint be dismissed.

/s/ David J. Young
David J. Young
DUNBAR, KIENZLE & MURPHEY
250 East Broad Street
Columbus, Ohio 43215
Telephone No. (614)228-4371
Trial Attorney for Defendants,
James Grit, Ewald Kane, Helen
Koloski, and Alvin Shames

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of January, 1976, a copy of the foregoing answer

was deposited in the United States mail, first-class postage prepaid, addressed to Joshua Kancelbaum, Esq., 2121 The Illuminating Building, Cleveland, Ohio 44113, Clyde Ellis, Esq., American Civil Liberties Union of Ohio Foundation, Inc., 203 East Broad Street, Columbus, Ohio 43215, and Thomas V. Martin, Esq., Assistant Attorney General, State Office Tower, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.

/s/ David J. Young
David J. Young



[filed March 16, 1976]
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| Benson A. Wolman, et al., | : | |
| Plaintiffs, | : | |
| v. | : | Civil Action No. C-2-75-792 |
| Martin W. Essex, et al., | : | Judge Kinneary |
| Defendants. | : | |

## STIPULATION OF FACTS

The parties, by and through their counsel, hereby enter into the following stipulation of facts, provided that each party reserves the right to argue the relevance, materiality, interpretation, and legal consequences of such facts. Much of the information in this stipulation concerning the implementation of 3317.06 of the Ohio Revised Code was obtained from the Ohio Department of Education; thus, the stipulation as it relates to implementation procedures is that if Ohio Department of Education officials were called to testify before this Court, their testimony would be as stated in this stipulation.

For the convenience of the Court, the stipulations herein are presented separately under the captions: Procedural Matters, Nonpublic Schools and Nonpublic School Pupils in the State of Ohio, Mechanical Operations

for Implementation of Legislation, Textbooks, Instructional Materials and Equipment, Diagnostic Services, Therapeutic Services, Standardized Testing and Scoring Services and Field Trips and Services.

A. Procedural Matters

1. (a) Plaintiffs are citizens and taxpayers of the United States and the State of Ohio.

(b) Plaintiffs are representative parties who will fairly and adequately protect the interests of the class of persons named in their complaint. Members of the class are so numerous as to make it impractical to bring them all before the Court. The claims of plaintiffs are typical of the claims to relief which other members of the class would assert.

(c) Jurisdiction is properly conferred upon this Court pursuant to Title 28, U.S.C.A., 1331, and this is an appropriate action for the convening of a three-judge court pursuant to Title 28, U.S.C.A., 2281 and 2284.

DY
2. The public /s/defendants are public officers as described in paragraph 3 of the complaint, having the duties and authorities therein described.

3. The nonpublic school defendants are parents of children attending various church-related or private, nonpublic schools who are in need of the assistance authorized by this Act.

4. Section 3317.06 of the Ohio



Revised Code was duly enacted by the General Assembly of Ohio, duly signed into law, and became effective in its present form on August 29, 1975. A true copy of the bill as enacted by the Ohio General Assembly is attached as Exhibit A.

5. Pursuant to 3317.06 of the Ohio Revised Code, the State Department of Education of Ohio promulgated guidelines on December 17, 1975. A copy of said guidelines is attached to these stipulations as Exhibit B, and said copy is hereby stipulated to be a true copy of said guidelines as adopted.

6. The 111th Ohio General Assembly adopted Amended House Bill No. 155 (general appropriations bills) which included an appropriation of $88,800,000.00 to implement 3317.06 of the Ohio Revised Code.

B. Nonpublic Schools and Nonpublic School Pupils in the State of Ohio

7. All children in the State of Ohio between the ages of six and eighteen years of age with the exception of those determined to be incapable of profiting from instruction are required to attend a public or nonpublic school which adheres to minimum educational standards prescribed by the State Board of Education or to be instructed at home pursuant to a program satisfying such minimum standards and approved by the State Board of Education. Another exception to the requirement of compulsory education at minimum standard schools may exist with respect to students who attend schools constitutionally exempt (e.g. Amish) from minimum standards. However, pupils who

attend such schools would not be eligible for assistance pursuant to Section 3317.06 of the Ohio Revised Code.

8. The nonpublic schools attended by children who will receive benefits under Section 3317.06 of the Ohio Revised Code are required by law to provide a secular education equivalent to that provided in the public schools in language arts including reading, writing, spelling, oral and written English and literature; geography; the history of the United States and Ohio; national, state, and local government in the United States; mathematics; natural science; health education; physical education; the fine arts including music; first aid; safety; fire prevention; industrial arts; home economics; foreign languages; and business practices.

9. In order to insure that nonpublic schools in Ohio comply with minimum educational standards established by the State Board of Education, such schools are inspected by representatives of the Ohio Department of Education.

10. The total number of chartered nonpublic schools in the State of Ohio during the 1974-75 school year was 720. The number of schools categorized by organizations administering them is as follows:

| | |
|---|---|
| Catholic | 657 |
| Private (non-sectarian) | 29 |
| Lutheran | 32 |
| Christian | 15 |
| Seventh-Day Adventist | 15 |
| Jewish | 8 |



| | |
|---|---|
| Baptist | 4 |
| Episcopal | 1 |
| Quaker | 1 |

The enrollment of these schools during the 1974-75 school year was:

| | |
|---|---|
| Catholic | 243,545 |
| Private (non-sectarian) | 8,701 |
| Lutheran | 4,568 |
| Christian | 3,224 |
| Seventh-Day Adventist | 1,569 |
| Jewish | 1,360 |
| Baptist | 829 |
| Episcopal | 76 |
| Quaker | 84 |

The total number of pupils attending chartered nonpublic schools during the 1974-75 school year amounted to 262,628.

11. Nonpublic school officials, if called, would testify that none of the schools attended by nonpublic school children covered by the statute involved in this litigation discriminate in the admission of pupils or hiring of teachers on the basis of race, creed, color, or national origin. The extent to which teachers in the various church-related, non-public schools are or are not members of the religious faith which administers the schools varies from school to school.

12. The manner in which the various religious and denominational institutions in the State of Ohio relate to the various church-related schools in Ohio varies among different denominations and different school systems.

13. If called to testify, officials of the Columbus Catholic schools would testify that the following facts are true with respect to most of the Catholic schools in the Diocese of Columbus (which are fairly representative of Catholic schools throughout the state of Ohio) but are not necessarily true in regard to other nonpublic schools including private, Lutheran, Christian, Seventh-Day Adventist, Jewish, Baptist, Episcopal, and Quaker schools.

(a) The administrative and policy-making responsibility for these schools is described in pages 2100 through 2123 of the School Policies and Regulations Manual which is attached hereto as "Stipulation Exhibit C." [erroneously "A" in the original]

(b) These schools are generally conducted in buildings and facilities owned or leased by the Bishop of the Columbus Diocese or by an entity representing a religious order.

(c) Most principals of such schools are members of a religious order within the Catholic Church; however, some such principals are members of the laity.

(d) Approximately 31.6% of the elementary and 31.9% of the high school teachers in the schools are priests, nuns, or otherwise members of Catholic religious orders who have taken vows of obedience to the Church. Catholic school representatives, if called, would testify that none of these teachers have vowed to obey the Church with reference to what they teach in school or how they teach it, that these teachers have not vowed to teach religious doctrine in



secular courses, and that their vow of obedience does not relate to these matters. Most religious teachers have discontinued the wearing of distinctive garb while engaged in teaching in the schools.

(e) Many of the classrooms, hallways, and assembly areas within such schools are decorated with a Christian symbol, such as the crucifix, as well as an American flag. Secular courses are often taught in a classroom containing a crucifix.

(f) All teachers and administrators within the schools are employees of the schools.

(g) Such schools in order to comply with the state minimum standards teach all of the required subjects during the five hour school day required by such state standards. In addition to this, they expand their school day to five and one-half hours, and the additional one-half hour is usually devoted to religious instruction. The scheduling of this added one half hour varies from school and is not necessarily at the beginning or end of the school day. Many public schools also provide more than the minimum standard five-hour school day in the instances when it is desired to provide education beyond that required by the minimum standards. hour is usually devoted to religious instruction. Such schools also program various religious functions and exercises, but such are either held during the religious course or the required five hour school day. Such religious exercises and practices include devotional activities, special religious activities on days of significance in the Christian calendar,

daily prayer, instruction concerning mass, confession and first communion, and religious vocational instruction if pupils indicate an interest in such. During the religion class, pupils are also taught the Catholic Church's views on topics of social concern such as marriage, divorce, sexual morality, family planning, abortion, and sterilization. Such subjects are discussed at appropriate grade levels and are not programmed for discussion except in religion classes. During the required secular course classes, pupils are taught course content generally equivalent to that taught in such classes in the public schools. Pupils who are not members of the Catholic faith are not required to attend religion classes or to participate in religious exercises or activities.

(h) The pupils in the schools who take religion courses are separately tested and graded on what they have learned in such religion classes. No testing fees are charged for any such tests.

(i) Some Catholic parish schools have tuition scales which require a higher tuition for pupils whose children are not members of the parish than for those whose parents are members of the parish. However, the tuition for nonparishioners applies to pupils and parents of the Catholic faith as well as to others. The typical situation where a Catholic parent with a Catholic child would pay the nonparishioner tuition scale would be where a Catholic parent lived within a parish boundary where a parish did not have a school, had a school which did not encompass all grades, or had a school which was not to the liking of that parent.



(j) Teachers of secular subjects include members of almost all religious faiths and sects, but in all probability a majority of the teachers are members of the Catholic faith.

(k) Lay teachers are hired by the schools after interviews with the principal of the school and with representatives of the local school board of education.

(l) A team appointed by the Diocesan Board of Education has authority to negotiate the salaries of teachers in the schools.

(m) No teacher in a Catholic school in the state of Ohio is required by the organization administering the school to teach religious doctrine as a part of or to integrate religious doctrine into the required secular courses taught in that school.

C. Mechanical Operations for Implementation of Legislation

If Ohio Department of Education officials were called to testify before this Court, their testimony with respect to implementation of Section 3317.06 of the Ohio Revised Code as described in sections (C) through (I) of this stipulation would be as follows:

14. The money used for implementation of this legislation comes from the general fund of the State of Ohio and is appropriated by the Ohio General Assembly to the Ohio Department of Education. The Ohio Department of Education allocates these

funds to the appropriate local school districts twice a year. The local public school districts will utilize the money to either purchase approved secular textbooks, instructional materials and equipment, standardized testing and scoring services and field trip transportation or to provide diagnostic and therapeutic services pursuant to the Act. In the event of the purchase of textbooks, instructional materials and equipment or standardized testing, the local public school districts will pay the money directly to the supplier and will retain title to the materials. When diagnostic and therapeutic service personnel are provided, these personnel will be hired by the local public school districts, their salaries will be paid by the local public school districts, and these employees will be entitled to all of the state-required fringe benefits. None of the monies appropriated for the implementation of the Act will be paid over to a nonpublic school.

15. Services or materials authorized by the Act are initiated by an application submitted to the local public school district from nonpublic school representatives. This application receives administrative approval by the local public school district personnel after consultation with one of the Ohio Department of Education field service coordinators. There are 33 such coordinators in 13 regional offices throughout the State of Ohio. These coordinators provide field management services for the Ohio Department of Education with regard to pupil transportation, distribution of all state monies to local school districts, driver education, disadvantaged youth programs, and auxiliary services. Before the benefits under the Act



are provided, the application must also receive formal approval from the local public school board of education.

16. Diagnostic and therapeutic service personnel hired by the local public school district to service nonpublic school pupils will receive their paychecks from the local public school district the same as any other public school teacher or public school diagnostic and therapeutic service personnel.

D. Textbooks

17. Division A of 3317.06 of the Ohio Revised Code provides for the loaning of textbooks to pupils attending nonpublic schools or to their parents. The books that may be loaned are limited to those which are acceptable for use in public schools in the state.

18. The loaning of textbooks will be based upon individual requests submitted by nonpublic pupils or their parents. These requests will be summarized by the nonpublic school and forwarded to the appropriate public school official.

19. The secular textbooks used in nonpublic schools will be the same as the textbooks used in the public schools of the state. Common suppliers will be used to supply books to both public and nonpublic school pupils.

20. Textbooks, including book substitutes, provided under this Act shall be limited to books, reusuable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of

study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group.

E. Instructional Materials and Equipment

21. A list of the materials and equipment supplied under earlier laws is attached as Exhibit D. [erroneously "C" in the original] It is expected that materials and equipment loaned to pupils or parents under the new law will be similar to such former materials and equipment except to the extent that the law requires that materials and equipment capable of diversion to religious issues will not be supplied. Plaintiffs reserve the right to argue that the two stated differences are not significant and that the restriction against supplying materials and equipment incapable of religious diversion cannot in fact be implemented.

22. This Act authorizes the employment of clerical personnel by local public school districts to administer the process of loaning instructional materials and equipment to pupils or their parents. The duties of these clerical personnel will include the following:

a. Distribution of loan request forms

b. Receipt and cataloging of loan requests

c. Maintaining an inventory of instructional materials and equipment

d. Distribution of instructional material and instructional



equipment to eligible nonpublic pupils or their parents

e. Collection of instructional material and instructional equipment

f. Maintaining custody and storage of materials and equipment

g. Performs all other duties necessary for the efficient implementation of the materials and equipment program.

23. The equipment and materials loaned to nonpublic school pupils or their parents pursuant to the Act are required by law to be used to supplement courses required to meet the minimum standards for elementary and secondary education adopted by the State Board of Education.

24. Most public schools will purchase all equipment and materials including those to be loaned to nonpublic pupils or their parents from common suppliers. Large systems will use the bidding process and include all items on the list regardless of whether or not they are to be used by the public or nonpublic pupil. The same personnel will make purchases for both public and nonpublic pupils and can readily assure that they are secular since they are purchased as public school items.

F. Diagnostic Services

25. These services are to be provided in the nonpublic school and would include speech and hearing diagnosis, psychological diagnosis and physician, nursing, optometric and dental diagnosis. The purpose of these

services will be towards determining if nonpublic pupils are deficient or in need of assistance in these areas. For example, the speech and hearing therapist would screen children to identify those with speech or hearing deficiencies. Treatment, if any, of the defect would take place off the nonpublic premises. Personnel (with the exception of physicians) employed to perform these services are employees of the local board of education. Physician service will be on a contract basis if that procedure is followed in the local public school district.

26. Nonpublic school administrators will coordinate the use of diagnostic service personnel by scheduling, providing space, and in some instances, identifying the children needing specialized diagnostic services. However, the diagnostic personnel are employed by the public board of education and under their control as to specific duties.

27. The diagnostic personnel who will provide services under this section like any other certificated person hired by the public school district, are subject to periodic inspection by supervisors sent out by the Minimum Educational Standards Division of the Ohio Department of Education. Although these personnel are subjected to periodic inspection visits by supervisors, such visits are for the purpose of determining whether they are engaged in the proper performance of their specialty. The state presumes that the health diagnostic services will be secular, since these personnel are hired by the public school, are trained in a designated specialty, are hired to perform services within that specialty, are



instructed to perform services only within their specialty because the authorized services are limited to diagnosis of health problems. In view of these facts, no state employee will inspect to see if these health diagnostic personnel concern themselves with religious matters.

28. A description of the functions of the diagnostic service personnel prepared by the State Department of Education follows:

(a) Functions of Speech & Hearing Therapy Staff

i. The function of the diagnostic speech and hearing therapist is to identify children who have speech and hearing handicaps and to refer them to the therapeutic speech and hearing therapist for treatment.

ii. He cooperates with the physician and nurse in the development of an appropriate hearing testing program to identify children with hearing problems.

(b) Functions of Psychological Staff

i. The function of the diagnostic psychological personnel is to identify children with psychological problems by utilizing child-study techniques, which include: a) a variety of recognized individual tests of appitude, b) individual measures to determine social and behavorial adaptability and

perceptual-motor problems, c) criterion reference instrumentation and interviewing and d) projective procedures.

ii. Children who require follow-up attention as determined by the child-study techniques are referred to the therapeutic psychological staff for treatment off the nonpublic school premises.

(c) Functions of the School Physician

i. He provides physical examinations of children entering school for the first time.

ii. He provides physical examinations of other children referred to him by members of the diagnostic services staff.

iii. He provides physical examinations for high school students seeking health permits.

(d) Functions of the School Dentist

i. He provides examinations, diagnosis and corrective dental treatment for children whose parents could not otherwise afford such care. The criteria for this determination shall be the same as that used for public school children.

ii. He provides guidance in establishing an oral hygiene program for the student body.



(e) Functions of the School Nurse

i. Aids in formation of policies and objectives of the school health service program and functions as part of the school health team.

ii. Determines health status of students by means of health appraisals.

iii. Interprets the health and developmental status of the student to himself, parents, and school personnel.

iv. Cooperates with Public Health in the control of communicable diseases.

v. Maintains orderly and current health records.

vi. Implements first aid and care of the sick or injured according to school policies.

vii. Works with school administrative staff, parent groups and students in promoting a safe and healthful environment in the school.

viii. Evaluates Health Services.

29. If sample health diagnostic specialists in each of these areas were called to testify, they would testify that the pupils requiring their services would typically be taken from the classroom individually and

that the diagnosis would be provided in a separate room or area of the building.

30. If called to testify under oath, the Ohio Department of Education officials would state to the Court that they do not intend under this legislation to approve applications for basic classroom instructional services. Such officials interpret this section as permitting only diagnostic services and further interpret this to exclude basic classroom instruction.

G. Therapeutic Services

31. These services would include therapeutic speech and hearing, therapeutic psychological, remedial, guidance and counseling, and services for children who are deaf, blind, emotionally disturbed, crippled, or physically handicapped. Each of these services can only be provided in the public school, in public centers or in mobile units located off the nonpublic premises. Personnel performing these services would be employees of the local board of education or under contract with the State Department of Health.

32. The determination as to whether these programs would be offered in the public school, public center, or mobile unit will depend on the distance between the public and nonpublic school, the safety factors involved in travel, and the adequacy of accommodations in public schools and public centers.

33. If a program is to be offered at a public center such as a library, public meeting hall, firehouse, or recreation



center, services may be available for public and nonpublic pupils at the same center. Although some local school districts in Ohio provide services to public school pupils in mobile units, when services are provided to nonpublic pupils in such units they will in all probability be stationed on public property close to the nonpublic school of attendance. These units will not be parked on nonpublic premises. While so stationed, the personnel in the unit will be providing services solely to nonpublic school pupils except in unusual circumstances where public school pupils would also receive services in the unit because of considerations relating to space, relative location, and efficient use of personnel.

34. If sample therapeutic service personnel in each of these areas were called to testify, they would testify that the pupils needing their services would be serviced either individually or with a small group of students having similar problems and that the service would be provided in the public school, public center or a mobile unit.

35. Nonpublic school administrators will coordinate the use of therapeutic service personnel by scheduling and in some instances, identifying the children needing specialized services. Since these persons are employed or contracted for by the public school board of education, they will be under their control as to specific duties.

36. A description of the functions of the therapeutic personnel prepared by the State Department of Education follows:

(a) Functions of the School Psychological Services Staff

i. The primary function of the therapeutic school psychologist shall be the intensive study and planned services to children, teachers and parents based on a differentiated referral system which includes child-study, scheduled parent and teacher conferences, psychological report writing and planning, implementing and monitoring intervention strategies.

ii. All comprehensive individual studies should be accompanied by concise written reports which include identifying data, reason for referral, interpretation of observational and assessment data, planned systems for teaching and reinforcement, specific recommendations for intervention, remediation and follow-up with the child, teacher and/or parent.

iii. The school psychologist should cooperate with appropriate community agencies, resources and facilities concerned about children with psychological problems.

(b) Functions of the Speech and Hearing Therapy Services Staff



i. The primary function of the speech and hearing therapist is to provide therapeutic services for children who have various speech problems. These include: a) defects of articulation and rhythm, b) voice disorders, c) disorders of speech and voice associated with organic abnormalities resulting in hearing loss and d) speech disorders associated with delayed or disturbed language development.

ii. The speech therapist should assist children in the transfer of newly acquired skills to the classroom.

iii. The speech and hearing therapist should work with appropriate community agencies, resources and facilities concerned about children with speech and hearing defects.

(c) Functions of the Guidance Services Staff

i. Individual and group counseling: Individual counseling assistance shall be easily accessible and promptly available to all students on matters of concern to them. Planned individual or small group counseling initiated by the counselor includes assistance to students in: a) developing self-understanding

through interpretation of test performances and other experiences, b) developing meaningful educational and career goals, and c) planning school programs of study.

ii. Group Guidance Instruction: Guidance instruction shall be systematically provided at each grade level.

iii. Parent Consultation: Individual conferences and group meetings are planned, initiated, and provided for purposes of discussing with parents their children's a) educational progress and needs, b) course selections, c) educational and vocational opportunities and plans, and d) study skills.

iv. Student Information Service: Information about individual students is collected and organized in cumulative guidance records. The information is available for interpretation to staff, parents, and students concerned.

v. Guidance Information Service: Current information materials are organized and easily available for use by staff and students.

vi. Guidance Research and Evaluation Service: Organized



provision is made to identify and describe the characteristics, accomplishments, and needs of student groups. Periodic surveys of current students and follow-up studies of graduates and dropouts are conducted to evaluate the effectiveness of the guidance program in achieving its objectives.

(d) Functions of the Learning Disability Staff Assisting the Deaf, Blind, Emotionally Disturbed, or Physically Handicapped Child.

i. Assesses the academic and instructional needs of the disabled child.

ii. Designs an instructional plan, based on the assessment information.

iii. Implements the instructional plan including the management of other disabled children within a group setting.

iv. Periodically communicates with parents as to the progress of their children in writing and in personal conferences.

v. Routinely evaluates each child's school progress.

(e) Functions of the Remedial Services Staff

i. Provide service to children whose problems are serious enough to warrant attention beyond that given in the classroom.

ii. Diagnose specific disabilities.

iii. Prescribe corrective programs for specific disabilities.

iv. Design corrective programs which are individualized.

v. Organize such instruction.

vi. Select materials and exercises which are suitable to the child's ability and instructional needs.

vii. Provide information to classroom teacher so there is reinforcement of skills and attitudes learned in the remedial program when the child returns to the regular classroom program.

H. Standardized Testing and Scoring Services

37. Division J permits the local public school district to supply to pupils attending nonpublic schools such standardized tests and scoring services as are in use in the public schools of the state. Such tests are used to measure the progress of students in secular subjects.

I. Field Trip Transportation



38. Division L permits local public school districts to provide such field trip transportation services as are provided to public school students. Field trips would consist of visits to governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students.

39. Intent and Policy of Department

The foregoing stipulated testimony of State Department of Education officials reflects the intent and policy of the State Department of Education with respect to implementation of Section 3317.06 Ohio Revised Code. The new law has not been implemented because of a temporary restraining order. Thus, the stipulation can only go to the intent and policies of the Department of Education rather than to the precise manner in which that intent of policy will or will not be carried out in all instances.

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STIPULATION OF FACTS - EXHIBIT A

[Stipulation Exhibit A, §3317.06 of the Ohio Revised Code, is set forth in the Appendix of the Jurisdictional Statement.]



STIPULATION OF FACTS - EXHIBIT B

GUIDELINES FOR IMPLEMENTATION OF SECTION 3317.06 AND DIVISION P OF SECTION 3317.024 OHIO REVISED CODE PROVIDING FOR LOANING OF TEXTBOOKS, INSTRUCTIONAL MATERIALS, AND INSTRUCTIONAL EQUIPMENT TO NON-PUBLIC PUPILS OR THEIR PARENTS; TO PROVIDE SERVICES TO PUPILS ATTENDING APPROVED NON-PUBLIC SCHOOLS.

I. GENERAL GUIDELINES

A. Funds shall be allocated to public school districts to purchase textbooks, instructional materials, and instructional equipment for loan to non-public pupils or their parents, and to provide services to pupils attending eligible non-public schools.

B. Non-public pupils or their parents may be loaned such textbooks, instructional materials, instructional equipment and may be provided services if the non-public school of attendance meets the following criteria:

1. Chartered by the State Board of Education.

2. Does not discriminate in the admission of pupils or hiring of teachers on the basis of race, color, creed, or national origin.

C. All requests for such textbooks, instructional materials, instructional equipment, and services shall be submitted on forms prescribed by the State Department of Education.

D. The public school district shall approve requests for textbooks, instructional materials, instructional equipment and services prior to the implementation of the program. Consultant services on the approval of requests may be provided by the State Department of Education.

E. Expenditures by public school districts for textbooks, instructional materials, instructional equipment, and services pursuant to Section 3317.06 O.R.C. shall not exceed the amount allocated to the district for the purposes of implementing such section.

F. Each public school district may retain not more than three (3) percent of the maximum allocation for non-public schools within the district, to defray the administrative, accounting, and handling costs related to the provisions of Section 3317.06 O.R.C.

G. No school district shall loan textbooks, instructional materials, instructional equipment, or provide services for use in religious courses, devotional exercises, religious training or any other religious activity.



H. All services to be provided to pupils attending non-public schools must be available for pupils in the public school district in which the eligible non-public school is located.

I. Textbooks, instructional materials, and instructional equipment shall be on loan to eligible non-public pupils or their parents by the public school district in which the non-public pupil attends school.

J. "Parent" as used in these guidelines shall include a person standing "in loco parentis" to a child.

## II. TEXTBOOK GUIDELINES

A. The public school district shall purchase and loan secular textbooks to pupils attending non-public schools within the district or to their parents.

B. The loaning of textbooks shall be based upon individual requests submitted by such non-public school pupils or their parents.

C. Requests for textbook loans shall be summarized by the non-public school and forwarded to the public school district.

D. Textbooks loaned to non-public school pupils or their parents shall be in compliance with Section 3329.01, Ohio Revised Code.

E. Textbook shall be defined to mean any book or book substitute which a pupil uses as a text or a text substitute in a particular class or program in the school he regularly attends.

III. INSTRUCTIONAL MATERIALS AND INSTRUCTIONAL EQUIPMENT GUIDELINES

A. The public school district shall purchase and loan instructional materials and instructional equipment to eligible non-public pupils or their parents.

B. All instructional materials and instructional equipment shall be secular, neutral, and non-ideological.

C. All instructional materials and instructional equipment shall be similar to those in use in the public schools within the district.

D. All instructional materials and instructional equipment shall be incapable of diversion to religious use.

E. Instructional materials and instructional equipment may be stored on the premises of the non-public school of attendance when in the determination of the State Department of Education it is necessary and appropriate for efficient implementation of this program.

F. The public school district may employ clerical personnel whose duties shall



include the following:

1. Distribution of loan request forms.

2. Receipt and cataloging of loan requests.

3. Maintain an inventory of instructional material and instructional equipment.

4. Distribution of instructional material and instructional equipment to eligible non-public pupils or their parents.

5. Collection of instructional material and instructional equipment.

6. Custody and storage of items under this guideline.

7. Performs all other duties necessary for the efficient implementation of the program under this guideline.

8. Clerical personnel may perform their services upon the premises of the non-public school, when in the determination of the State Department of Education, it is necessary and appropriate for efficient implementation of this program.

IV. SERVICE PROGRAM GUIDELINES

A. Diagnostic Services

1. Diagnostic service shall only include the following programs:

   a. Speech and hearing diagnosis

   b. Physician, nursing, dental and optometric diagnosis

   c. Diagnostic psychological services

2. Such diagnostic services shall be provided in the non-public school attended by the non-public pupil receiving the service.

3. Such services shall not be provided to non-public pupils unless such services are available to pupils attending public schools within the district.

4. Diagnostic services may be provided under contract with the State Department of Public Health.

B. Health, Remedial, and Guidance and Counseling Services

1. Service program shall only include the following programs:

   a. Therapeutic psychological services

   b. Therapeutic speech and hearing services

   c. Remedial services



   d. DBECN and EMR services

   e. Guidance and counseling services

2. Such programs shall not be provided to non-public pupils unless such services are available to pupils attending the public schools within the district.

3. The State Department of Education shall determine if the program shall be provided in the public school, in public centers or in mobile units off the non-public premises.

4. If programs are provided in the public school or in public centers and transportation is necessary, the transportation shall be provided by the public school district in which the non-public school is located.

5. The cost of transporting pupils in these programs shall be paid by the public school district from its General Fund when such programs are offered in the public school or in public centers.

6. Therapeutic psychological and speech and hearing services may be provided under contract with the State Department of Public Health.

C. Standardized Tests and Scoring Services

1. The public school district shall supply standardized tests and scoring services for use by pupils attending non-public schools within the public school district.

2. Standardized tests and scoring services provided hereunder shall include only (a) such tests and scoring services as are in use in the public schools of Ohio, and (b) appear on a list maintained by the State Department of Education.

D. Field Trips and Services

1. Field trip transportation and field trip services shall be provided to non-public school pupils as is provided to public school pupils in the district.

2. School districts may contract with commercial transportation companies for such transportation service if school district buses are unavailable.

V. FUND DISBURSEMENT GUIDELINES

A. The State Department of Education will distribute funds for each fiscal year for which funds are appropriated to the public school district for the purpose of implementing Section 3317.06 of the revised code in the following manner:



1. In September (50) percent of an estimated allotment for the purpose of providing services and loaning of textbooks, instructional materials, and instructional equipment to non-public pupils.

2. In January, the remainder of the actual maximum allocation, as determined by the October non-public average daily membership, will be disbursed.

B. The October non-public average daily membership may include only pupils enrolled in grades one through twelve.

C. Payments to public school district to loan textbooks, instructional materials, instructional equipment, and to provide services, as identified in these guidelines, will be made regardless of the provisions of Section 3317.01 O.R.C.

D. Unencumbered and unexpended funds, at the close of the first year of the biennium, for a non-public school shall be carried forward into the succeeding fiscal year by the public school district to purchase textbooks, instructional materials, and instructional equipment for loan to non-public pupils or their parents and to provide services to the non-public pupils during the second year of the biennium.

E. Unencumbered and unexpended funds at the close of the second year or the

biennium shall be returned to the Treasurer, State of Ohio.

F. Funds allotted for non-public pupils attending non-public schools located within the public school district for which no requests have been submitted shall be returned to the Treasurer, State of Ohio, after the close of each fiscal year.

G. A report of expenditures, for each chartered non-public school within the public school district, shall be filed by the public school district, with the State Department of Education on or before November 15, following the close of the fiscal year for which funds were expended, on forms prescribed by the State Department of Education.

H. For fiscal year 1975-76, the State Department of Education may modify any of the guidelines of this section relating to distribution of funds as may be determined necessary in order to distribute funds to be utilized during the school year.



STIPULATION OF FACTS - EXHIBIT C

Diocese of Columbus

ADMINISTRATION **

Central Administration

A. THE MOST REVEREND BISHOP

Full responsibility for the educational apostolate in the diocese belongs ex officio to The Most Reverend Bishop. He associates others with himself in this work by appointing agencies and individuals to assist him.

B. THE VICAR EPISCOPAL FOR EDUCATION

He is appointed by the Most Reverend Bishop to direct the Department of Education and is responsible for the overall direction of the educational programs in the diocese.

C. DIOCESAN BOARD OF EDUCATION

The Board is established by the Bishop for the purpose of formulating educational policies for the schools under his jurisdiction.

In addition to its policy-making responsibility, the Board of Education also reviews and approves regulations and projects recommended by the Superintendent of Schools.

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Furthermore, the Board of Education will consider educational issues presented to it by any of the clergy, religious, or laity of the diocese, provided these issues fall within its competence as a policy-making body.

D. SUPERINTENDENT OF SCHOOLS

The Superintendent shall be responsible directly to the Diocesan Board of Education for the implementation of its policies in the Diocese.

It shall be the responsibility of the Superintendent to work out guidelines for administrative procedures, including those areas in which it will be presumed that he will act without explicit directives from the Board.

The Superintendent of Schools shall represent the schools of the diocese in matters relating to the State Department of Education and local school officials.

Central and Supervisory Personnel

A. Department of Elementary and Secondary School.

The administrative staff of the Superintendent of schools comprises the Assistant Superintendent of Schools; Diocesan Supervisors for: Instruction, Government Aid, Educational Media Centers, School Food Services; the Chairmen of the Curriculum Committees; and the clerical staff.



B. Department of Religious Education.

The Department of Religious Education is under the jurisdiction of the Episcopal Vicar of Education and is administered by the Director of Religious Education and his staff of supervisors.

All areas of Religious Education are subject to the direction and supervision of the Department of Religious Education. This includes:

1. Adult Religious Education.

2. Elementary and Secondary Religious Education for parochial and CCD schools.

3. Special Education for the Handicapped, (The Blind, Deaf, Retarded).

The Pastor

1. The Pastor is ex officio responsible for the welfare of the parish school. His principal responsibility is to see that an effective program of religious education is maintained in the school. The immediate direction of the school and its instructional program is, however, delegated to the Principal.

2. The Pastor and Principal shall hold regularly scheduled conferences on the activities of the school. The Pastor shall cooperate with the Principal in all things that pertain to the school.

3. The Pastor shall cooperate with the Diocesan Board of Education and the Superintendent of Schools in observing all diocesan and state regulations pertaining to the administration and organization of the schools.

4. It is recommended that the Pastor share his responsibility for the parish school with a representative group of parents and parishioners. This group (Parish School Board, Education Committee, Educational Consultants, etc.) shall be charged with the formulation of policies to govern the operation of the school.

   All such policies, however, must be in accordance with those set by the Diocesan Board of Education. They should, moreover, be broad enough to allow the Principal sufficient flexibility in the operation of the daily program, yet narrow enough to provide clear direction for the administration of the school.

5. The maintenance of buildings and grounds is the responsibility of the Pastor.

Supervisor

A diocesan supervisor is a member of the Diocesan Department of Education and is directly responsible to the Diocesan Superintendent. She is his representative in the professional relations with principals and teachers.

The diocesan supervisor shall strive to make diocesan school policy better known, thereby encouraging more consistent observance of



diocesan regulations. The supervisor shall work with the principal and her teaching staff to improve the teaching-learning situation.

A. The general supervisor shall seek to carry out her role through the following activities:

   1. Visiting every school at least once a year.

   2. Publishing diocesan bulletins whenever a need arises.

   3. Organizing and working with diocesan curriculum committees.

   4. Planning in-service growth programs for teachers and principals.

   5. Assisting the principal in her supervisory role and in her direction of curriculum planning and development.

B. The special area supervisor brings expertise in such fields as religion, language arts, educational media.

   The Religion Supervisor shall visit the schools of the diocese once a year. She shall function as a resource person in the area of religious education, providing in-service workshops for the teachers and coordinating the religion programs of the diocesan elementary schools with the policies set by the Department of Religious Education.

   She shall assist in the implementation of

total religious education programs in the parishes of the diocese, whether or not such parishes have parochial schools.

The Language Arts Consultant (Grades 7 through 10) shall assist in setting up pilot programs in schools that request them; shall work with the elementary and secondary curriculum committees in setting up goals and objectives; shall act as a resource person available for consultation about time, materials and techniques; and shall facilitate the calling of meetings for teachers at the local level, the area level and the diocesan level.

The Diocesan Reading Coordinator strives for the diocesan school goal that all students leaving the system be able to read to the full limits of their capability. To accomplish this, reading instruction in the elementary schools is supervised by giving whatever assistance is necessary to teachers, parents and students.

The Multi-Media Supervisory Staff is available for consultation when its members visit the Multi-Media Centers in the schools; the staff conducts workshops and seminars, helps, in the selection of resource materials, in the planning of facilities and in the ordering of auxiliary materials from the state.



STIPULATION OF FACTS - EXHIBIT D

[Extract from Stipulation of Facts in prior case]

D. Materials and Equipment

19. Although it is antitipated that increased funding will be used to provide auxiliary educational and health service personnel, assistance provided under the Act since 1967 has included instructional materials as appear on approved public school purchase lists. It is anticipated that these instructional materials will continue to be provided from time to time along with the increased level of auxiliary educational and health service personnel. In order to determine the kinds of materials and equipment supplied under the Act, a survey was accomplished of various local public school districts in the state including two large districts, two medium-sized districts, and two small districts. The equipment and supplies provided by those districts for the benefit of non-public school pupils include:

Lima City--Allen County School District

Equipment:

Audio visual projector
Reading projectors
Science film strips
Health film strips
Music records
Test scorer
Teaching tapes
Stereo record player
Micro projector
Mobile science laboratory
Film strip projector

Science records
Maps and globes
Music books
Storage cabinets
Combo pact
Study guides
Picture prints
Reading cassettes
Social studies tapes

Supplies:

Science kits
Supplementary readers
Arithmetic kits
Scholastic testing programs
Reading laboratory kits
Reading tests
Answer sheets

Cincinnati City School District

Equipment:

Overhead projector
Film strip projector
Tape recorders
Record players
Slide projector
Film strips and slides
Head sets
Reading pacer with film
Sewing machines
Typewriters
Library chairs

Supplies:

Paper
Duplicating paper



Masters
Supplies for science class
(glassware, etc.)

Indian Creek Local, Jefferson County School District

Equipment and Supplies:

Weather forecasting charts
Lunar terrain models
Fossil collections
Metric system materials
Maps - solar system
Maps - social studies
Flash cards
Vegetable-fruit poster cards - language arts
Word games - language arts
Flannel boards
Look and say tests

Toledo City School District

Equipment:

Reading
1. Pacers
2. Tachistoscopes
3. Laboratories

Projectors
1. Movie
2. Opaque
3. Overhead

Televisory
1. Video tape machines
2. Receiver sets (color and black/white)
3. Cameras

Audio recorders
Maps and Globes
Primary typewriters

Copy machines for instructional materials
Dictation machines
Shelving for books

Supplies:

Remedial reading
Science
Felt board supplies
Tapes, films, and books
Copy paper
Encyclopedias

Mansfield City School District

Equipment:

Film strip projectors
Record players
Moving picture projector
Gymnastic
Overhead projectors
Shadow scope reading pacers
Acoustic carrels
Tape recorders
Television set
Audio readers
Rotomatic
Youth torso for science
Projector screen
Tables (for projector equipment)
Transparency maker
Tripod map screen
Headphones
Electro-static generator with discharger, meters, wire testing apparatus
Terrarrium
Thickness mats
Junior scooters
Plastic hand viewers



Supplies:

Reading skill library
Master manual
Books (e.g., social science periodicals, history books and history guides, English workbooks and guides, and dictionaries)
Learning kits (e.g., reading skill library, reading labs, arithmetic labs, etc.)
Units of art materials
Accompanying records for film strips
Speech master units
Units of science equipment
Various issues of magazine periodicals
Projector replacement bulbs
Recording tapes
Typewriting textbooks
Shorthand books
Supplies for transparency maker

Westerville City School District

Equipment:

Tape recorders
Overhead projectors
Record players

Supplies:

Film loops
Library books
Pre-recorded cassettes
Miscellaneous media materials

## ORDER AND OPINION BELOW

[The Order and Opinion Below appears in the Appendix to the Jurisdictional Statement at pp. A1-A33.]

# IN THE SUPREME COURT OF THE UNITED STATES

**October Term, 1976**

## NO. 76-496

BENSON A. WOLMAN, ET AL.,
Appellants,

v.

MARTIN W. ESSEX, ET AL.,
Appellees.

**On Appeal From the United States District Court For the Southern District of Ohio**

## MOTION TO DISMISS OR AFFIRM

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James Grit, et al.

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# IN THE SUPREME COURT OF THE UNITED STATES

**October Term, 1976**

## NO. 76-496

BENSON A. WOLMAN, ET AL.,
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v.
MARTIN W. ESSEX, ET AL.,
Appellees.

**On Appeal From the United States District Court For the Southern District of Ohio**

## MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees James Grit, Ewald Kane, Helen S. Kowloski and Alvin Shames move to dismiss this appeal or, in the alternative, to affirm the judgment below, on the grounds that the appeal does not present a substantial federal question; that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument; that the unanimous Three-Judge Court Opinion reflects a proper application of the principles enunciated in *Meek* v. *Pittenger*, 421 U.S. 349 (1975); that the issues presented by appellants arise out of a background unique to the State of Ohio and are primarily of local concern; and that the primary purposes and effects of the Act are secular and can be implemented without excessive governmental entanglement with religion.

## Argument

A. The Issues Raised by Appellants Arise Out of a Background Unique to Ohio and These Issues Are Primarily of Local Concern.

**Background.**

The State of Ohio has been furnishing health and remedial services and supplemental instructional materials to public and nonpublic school children alike for many years. Although Ohio cannot cite this Court to the "full page of history" alluded to in *Waltz* v. *Tax Commissioner*, 397 U.S. 664 (1970), it can point to a nine-year history of implementation of this program without evidence of abuse, aid to religion, entanglement between state and religion or political divisiveness.

Section 3317.06(H) of the Ohio Revised Code (the predecessor of current R.C. 3317.06) was enacted by the Ohio General Assembly in 1967. This legislation was enacted and has been revised periodically as a portion of omnibus education legislation directed for the most part to public school assistance. All aid to the nonpublic school pupils is channeled through the local public school districts. Each division of the Act is independent and fully severable. No monies are allocated to religious organizations, to nonpublic schools or to nonpublic school parents or pupils. Services and materials may not exceed those available to public school pupils. This assistance is provided only if teachers are hired and pupils admitted in the nonpublic school without distinction on the basis of race, religion or national origin.



**No Evidence of Abuse.**

To be sure, the Ohio General Assembly has restructured this legialation over the years in order to honor new tests or guidelines announced by this Court. But, even though the formula and mechanics have been recurrently restructured in order to meet this Court's criteria, the fact remains that Ohio, unlike other states, has a unique, nine-year history of implementation of this sort of assistance. It was in consideration of this nine-year history that the lower court did not see fit to decide the case on the basis of speculation, conjecture or presumptions. The lower court was well aware that the predecessor of the challenged legislation has been carried out without aiding religion and without excessive entanglement between church and state. Appellants didn't present any evidence to the contrary.

**Prior Litigation.**

Plaintiffs sought to prove that auxiliary assistance aided religion and created entanglement between church and state in the case testing the constitutionality of the predecessor of R.C. 3317.06. The record in *P.O.A.U.* v. *Essex*, 28 Ohio St. 2d 79 (1971) reflects an extensive trial with opposing counsel examining and cross-examining publicly-hired and controlled personnel providing the health and auxiliary services, parents, teachers, members of the clergy and public school administrators. The specific question in that case was whether there had been attempts to divert materials and equipment to religious use or to hire personnel that might succumb to sectarianism. Plaintiffs in that case failed to prove any such abuse. The lengthy record reflected ad-

mirable adherence to the letter of the law. This is why the constitutionality of the law was upheld by the state trial court, the state appellate court and the Ohio Supreme Court. The Ohio Supreme Court specifically found:

> "The materials and services provided by R.C. 3317.06(H) do not lend themselves to the religious aura of the recipient sectarian schools. Upon the record before us, they enhance *only the secular educational process* and that process is properly the concern of the state."
>
> [28 Ohio St. 2d 83.]
> (Emphasis added.)

*P.O.A.U.* v. *Essex* was brought and tried as a class action. Plaintiffs did not see fit to appeal the Ohio Supreme Court Decision to this United States Supreme Court.

**Not a Case of Nationwide Concern.**

Appellants assert that the issues they present are of nationwide concern because, unless restrained, the Ohio Act could spread and result in widespread entrenchment of programs of questionable First Amendment consequence. To be sure, nonpublic schools throughout the country are confronted with financial headaches. But legislation similar to the Ohio Act won't solve their financial problems. If the health and auxiliary service assistance is stricken, the nonpublic schools won't spend more money. Nonpublic school children will simply be denied treatment of learning disabilities and handicaps. Likewise, if the material and equipment library-lending program to nonpublic school pupils is stricken, children



will be denied this added dimension which enhances their educational experience. This legislation doesn't directly or indirectly put money in the nonpublic school coffers. It simply removes handicaps and enriches the learning opportunities of deprived children.

In a series of establishment clause decisions starting with *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso*, 403 U.S. 602 (1971), and concluding with *Hunt* v. *McNair*, 413 U.S. 734; *Sloan* v. *Lemon*, 413 U.S. 825; *Committee For Public Education* v. *Nyquist*, 413 U.S. 756; *Norwood* v. *Harrison*, 413 U.S. 455; and, *Levitt* v. *Committee for Public Education*, 413 U.S. 472, in June of 1973, this Court announced Establishment Clause principles which had far-reaching effects upon the efforts of various states to alleviate financial hardships suffered in the nonpublic educational sector. These cases made it perfectly apparent that no new form of general purpose financial aid could be channeled directly or indirectly to nonpublic schools.

These principles were expanded in *Meek* v. *Pittenger*. However, this does not mean that the states must now ignore the plight of the child in a nonpublic school. In *Norwood* v. *Harrison* this Court made it clear that aid "properly confined to the secular functions of sectarian schools" will survive:

> "Neither Allen nor Everson is dispositive of the issue before us in this case. Religious schools 'pursue two goals, religious instruction and secular education.' [Authority cited] And, where carefully limited so as to avoid the prohibitions of the 'effect' and 'entanglement' tests, States may assist church-related schools in performing their secular functions [Authorities cited], not only because the States have a substantial interest in

> the quality of education being provided by private schools [Authorities cited], but more importantly because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others."
>
> [413 U.S. 468.]

Past decisions of this Court tell us that assistance, which is part of a general legislative program made available to all students, will survive to the extent that it is limited to bus transportation, school lunches, public health services and secular, neutral and non-ideological assistance unrelated to the educational function of the school.[1]

Appellants' claim that this case presents issues of national importance because of potential multi-state adaptation, is belied by the fact that the *Federal Elementary and Secondary Education Act*, which provides similar services, was adopted in 1965 and has been in effect for approximately 11 years. That Act provides health and auxiliary services and instructional materials and equipment to both public and nonpublic school pupils.[2]

The ESEA legislation was considered by this Court in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974). Its continued implementation for 11 years has not resulted in the nationwide problem forewarned by appellants. The obvious explanation is that the federal legislation, like the Ohio Act, does not provide a solution to the financial plight of nonpublic schools. To be sure, it is supported by large appropriations,

[1] *Meek* v. *Pittenger*, 421 U.S. 349, 364 (1975).
[2] For example see 20 U.S.C.A. §§ 823, 825, 241(e).



but this doesn't automatically provide a solution to the financial plight of nonpublic education. The important criterion relates to the use of the funds. If they provide health service, they don't solve financial problems. If they provide grants or credits, they do.

The nonpublic school is not the beneficiary regardless of whether the disabled child receives an expensive or inexpensive cure. If other tests are met, the Establishment Clause should be no more concerned if the state appropriates $10,000 in order to cure a physical, emotional or learning disability than if it appropriates $10.00 for that same purpose. Many of the disabilities sought to be remedied by this legislation are serious, destructive to the child and costly to treat. The cost of treatment is an educational and public policy decision rather than an Establishment Clause question.

B. The Unanimous Opinion of the Three-Judge Court Reflects a Careful Application of the Principles Enunciated by This Court in *Meek* v. *Pittenger*.

The lower court has a commendable history of respect for and careful application of principles enunciated by this United States Supreme Court. When Ohio adopted an educational grant program for nonpublic school pupils, the lower court demonstrated a keen sensitivity to significant Establishment Clause principles in its Opinion finding such grants to be violative of the First Amendment.[3]

Similarly, although the lower court upheld the constitutionality of former Ohio Revised Code §3317.062, when its judgment was vacated and

[3] *Wolman* v. *Essex*, 342 F. Supp. 399 (S.D. Ohio E.D. 1972), aff'd 409 U.S. 808 (1972).

remanded in *Wolman* v. *Essex*, 421 U.S. 982 (1975) the lower court immediately restrained further implementation.[4]

The fact is that the Supreme Court of the United States has, in a series of First Amendment cases, starting with *Everson* v. *Board of Education*, 330 U.S. 1 (1947), clearly enunciated Establishment Clause principles applicable to nonpublic school pupil assistance. What is left is local application of those principles by educators, legislators and lower courts. Refusals by lower courts to follow these criteria or a misapplication of them may very well lead to further decisions by this Court. The constitutionality of the Ohio legislation, which has a unique legislative and implementation history, has been sustained by a lower court, and the Opinion of that court reflects an honest and careful application of the principles enunciated by this Court.

**Secular Educational Materials and Equipment.**

Appellant accurately notes that the major difference between the current Act and its predecessor with respect to the supply of secular materials and equipment is that the property is now loaned directly to pupils and parents rather than to schools. However, appellants' use of the words "ploy" and "sham" in characterizing the Ohio General Assembly's efforts to assist children in need would be more appropriate in a jury trial argument than in an analysis of Establishment Clause principles. There was nothing hidden or *sub rosa* about the legislative intent. The Ohio General Assembly has provided secular, neutral and nonideological equipment and materials for the benefit of nonpublic school pupils in Ohio for approximately nine years. The findings of the General Assembly have been consistent with those of the Ohio Supreme Court in *P.O.A.U.* v. *Essex*, and with the findings of this Court in *Meek* v. *Pittenger* — that is, that the "material and equipment that are the subjects of the loan — maps, charts, and laboratory equipment, for example — are 'self-policing,' in that starting as secular, nonideological and neutral, they will not change in use." [421 U.S. 365.]

Appellants were not able during their briefs or oral arguments to point to any constitutionally-meaningful distinction between books and materials when both are secular, neutral, nonideological and unable to be diverted to religious use. If there is no constitutionally-meaningful difference in the nature of the items supplied, then we must look to some other justification for the different treatment of the two in *Meek* v. *Pittenger*.

The Ohio General Assembly operated on the premise that the United States Supreme Court treated the two differently in *Meek* v. *Pittenger* because the books under the Pennsylvania program were loaned

[4] Appellants in footnote 3 at page 4 of the jurisdictional statement do not present a fully accurate representation of the consent order in *Wolman* v. *Essex*, No. 73-292, which found the prior legislation unconstitutional. Pertinent portions of the consent order recite:

"Counsel for defendants and intervening defendants have represented to this Court that they do not seek to urge distinguishing features between the Ohio legislation considered herein and the Pennsylvania legislation considered in *Meek* v. *Pittenger*, *supra*, and do not seek to urge the severability of various provisions in the Ohio legislation because the Ohio General Assembly has repealed that legislation and enacted new legislation (known as Senate Bill 170) providing nonpublic school pupil assistance.

* * *

"This order is not intended to address or adjudicate the constitutionality of Senate Bill 170."

[¶¶ 2 and 5 in November 17, 1975, Consent Order, *Wolman* v. *Essex*, Civil Action No. 73-292.]

to the pupils whereas the materials and equipment were loaned directly to the school. Thus, the new Ohio Act very carefully spells out a "lending-library" procedure for dissemination of educational materials to pupils. It authorized publicly-employed and controlled clerical personnel to administer the lending-library program.

The legislation in *Meek* v. *Pittenger* called for placing the control of the materials and equipment in the hands of a religious organization. *It permitted the religious organization to determine where, when and how the materials were to be used.* In *Meek* v. *Pittenger*, if the state wanted to make an investigation concerning the materials and equipment, it had to relate to the religious organization and become entangled with religious personnel. To the contrary, under the Ohio plan, the materials and equipment are in the possession and control of publicly-employed and controlled clerical lending personnel. If the state wanted to inventory the materials and equipment or make an investigation for educational or other purposes as to how the material or equipment was being used, distributed, stored, inventoried, catalogued or lent, it would relate not with religious organizations but to personnel hired and controlled by the local public school district.

Thus, we not only have a difference with respect to the direct recipient of the loan but also a difference with respect to potential entanglement.

In arguing that the identity of the recipient is not controlling, appellants try to compare the current Ohio plan to, for example a direct money-aid program such as that stricken in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973). The comparison



is inappropriate. If the aid provided is not inherently secular, neutral and nonideological, then to be sure the identity of the recipient is less important. But, if the aid of necessity remains with the recipient and is inherently secular, the identity of the recipient is much more important. If the state gives the child money to turn over to the religious organization, the identity of the initial recipient is not particularly relevant. The question is, would the money turned over by the pupil or parent to the religious organization be for secular or religious purposes? This could only be determined by implementation of an entangling series of relationships between church and state.

However, if the state supplies a service such as speech and hearing therapy directly to a child at a public facility, there should be no legitimate concern about transfer of benefit to a religious organization. The recipient is clearly the child, and the secular and nonideological benefit cannot be transferred by the child to any religious organization. Likewise, if the state lends a piece of secular, neutral and nonideological equipment that is incapable of diversion to religious use directly to a child or his parent there can be no fear of conversion of that equipment to a religious use. Here, again, the identity of the recipient is significant because the aid program is incapable of flowing through to a religious organization via the child-conduit.

Although appellants at page 19 of their jurisdictional statement cite *Committee for Public Education* v. *Nyquist*, for the proposition that the identity of the recipient is not significant, the quoted portion from the Opinion is completely consistent with the foregoing analysis:

> "[t]here can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools . . . *In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes*, it is clear from our cases that direct aid in whatever form is invalid."
>
> [413 U.S. at 780.]
> (Emphasis added.)

This Court in *Nyquist* made it quite clear that it was rejecting *direct aid* to the religious school and that any indirect program which was designed to provide financial support for the sectarian institutions would be stricken. Under the Ohio Act, the aid is not directly to a religious organization, and there are effective means of guaranteeing that the state aid will be exclusively for secular, neutral and nonideological purposes.

Under the Ohio Act, the secular, neutral and nonideological assistance *stops with the child*, and there is no possibility for the child to act as a direct or indirect conduit of financial assistance to any sectarian organization.

It is unclear from appellants' jurisdictional statement whether they are arguing that a pupil is barred from borrowing secular, neutral and nonideological materials or equipment simply because he has selected a nonpublic school. We assume that every state has for years had mobile library programs which travel to public and nonpublic schools. The pupils are able to check out secular educational materials and books. How can it be argued that such a program violates Establishment Clause restrictions? By



creating the lending-library clerks, the Ohio General Assembly has established a program almost identical to the mobile libraries and has rather clearly avoided any Establishment Clause restraints.

**Health, Diagnostic and Remedial Services.**

Appellants, from the outset, have conceded that various severable provisions of the Ohio Act are indeed constitutional. Yet, there is no record basis for distinguishing that which they concede to be constitutional from that which they challenge as being violative of the Establishment Clause. For example, appellants concede the constitutionality of physician, nursing, dental and optometric services; but argue that diagnostic psychological and diagnostic speech and hearing services stand on a different footing. These arguments are without record support. Neither the diagnosing psychologists nor diagnosing remedial reading specialists can be compared to a teacher. Neither of these personnel is performing educational functions. They are strictly health functions, and as a matter of fact, may, pursuant to the Ohio Act, be performed by the Ohio Department of Health.[5]

As noted by the three-judge trial court "The parties have stipulated that the purpose of these diagnostic services is to determine if nonpublic pupils are deficient or in need of assistance in these areas."

Appellants also urge without justification that the dictum in *Meek* v. *Pittenger*, be rejected [Jurisdictional Statement, p. 25]. Since diagnostic services are clearly health services, this suggestion should not be adopted. Appellants' suggestion that health personnel

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[5]The pertinent provision of the Act states:

"Health services provided pursuant to divisions D, E, F and G of this section may be provided under contract with the state department of public health. [R.C. 3317.06.]

will interpret "alleged heretical attitudes" as health problems is too utterly absurd to warrant response.

Appellants likewise, after conceding the constitutionality of providing remedial services to nonpublic school children at the public school situs, ask this Court to declare that the provision of such services in publicly-owned and controlled centers or mobile units violate Establishment Clause restrictions. Here, again, there is no record justification for such a distinction. If appellants would have this Court presume that a publicly-employed and controlled auxiliary service specialist would succumb to sectarianism simply because he was working with a child of a given religious persuasion at a public center, then it must logically follow that children of any given religious persuasion must be denied these services at all locations, even public schools. Appellants also try to gain jury-trial-type equities by unfairly referring to "curbside assistance" and "special satellite facilities." They also falsely suggest that substantial portions of the allocation of funds would be used to build public centers for the provision of such services. It's perfectly obvious that the Act does not authorize any such construction, and it is deceptive for appellants to urge that such could be done because there is no restriction in the Act. The stipulation with respect to the public situs of such services is clear and unequivocal.[6]

Appellants further present a strained argument that somehow or another a nonpublic school pupil would be receiving a special benefit if he received speech and hearing therapy in, for example, a public

[6]Stipulation No. 32 provides:

"The determination as to whether these programs would be offered in the public school, public center, or mobile unit will depend on the distance between the public and nonpublic school, the safety factors involved in travel, and the adequacy of accommodations in public schools and public centers.



center such as a library, public meeting hall, firehouse or recreation center rather than in the public school. This assertion is without foundation in educational, health or financial fact. The ideal situs for, for example, speech and hearing therapy, would be the school of attendance. Since speech and hearing therapy personnel are not permitted to provide their services to a nonpublic school pupil at the nonpublic school, then he must travel to some public center to receive the service.

The situs of the service will depend upon the distance of the school of attendance from the local public school, safety factors involved in travel and the adequacy of accommodations in public schools and public centers. Can appellants really believe that a child with a hearing defect will be receiving an extra benefit if efforts to cure that defect take place at, for example, a special room in a public library rather than in the public school? The publicly-hired and controlled hearing therapist will be the same regardless of whether the service is provided in the public school, in a public center or in a mobile unit. The equipment will be the same. The program will be the same. There is no record evidence or basis in fact for arguing that the service will be more or less effective in either location. There is no record evidence or basis in fact for arguing that the nonpublic school would somehow or another benefit if the child received the service in a public center or mobile unit, but not if the child received the service in a public school, in a health center or in a hospital. It simply strains all rules of reason to argue that when a child receives speech and hearing therapy in a public center from a publicly-hired and controlled speech and hearing therapist, the end result is aid to religion. By arguing that there is no

difference between a public center and church-related school, appellants completely ignore a fundamental premise in *Meek* v. *Pittenger*.[7]

By seeking to ignore the difference between a publicly-owned and controlled center and a church-related school, appellants also ignore the excessive entanglement doctrine which applies only when the policing of an assistance program requires entangling relationships between church and state. If it were necessary to police a speech and hearing therapist providing services at a public center, the relationship would be between the state and a publicly-hired therapist performing services at a public facility. Also the likelihood of that therapist succumbing to sectarianism is removed when the therapist is no longer performing services "in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained."

## Conclusion

The Ohio General Assembly has revised its legislation to comply with the principles enunciated by this Court in *Meek* v. *Pittenger*. Prior to 1967, when these services weren't available, children with severe learning disabilities led unhappy, troubled and frustrated lives. A child who had a hearing defect was punished because he wasn't achieving as he should in school. The child who was receiving low grades, might very well have been at the head of the class had he received remedial reading assistance. The child who was

[7]Mr. Justice Stewart in announcing the majority opinion stated:

"But they are performing important educational services *in schools* in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained."

[421 U.S. p. 371.]
[Emphasis added]



placed in the corner or in the back of the room and ridiculed by other children might very well have needed physical or psychological help rather than discipline and ridicule. Remedial services essential to eliminate these handicaps and disabilities are expensive and it has proven to be a fact that they simply aren't available without special state assistance.

During the past nine years, while the State of Ohio has been providing such assistance, many thousands of children have been able to become productive citizens because their handicaps have been removed. This legislation has a sound secular purpose and effect, and can be administered without entanglement with religious organizations. This statute has been drafted carefully to meet the criteria enunciated in *Meek* v. *Pittenger*. The Ohio General Assembly was well intentioned in trying to continue this form of assistance to all of its children. The lower court properly declared Ohio Revised Code § 3317.06 and all of its divisible and separable branches to be constitutional.

Respectfully submitted,

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# In the Supreme Court of the United States

**October Term, 1976**

**Case No. 76-496**

BENSON A. WOLMAN, ET AL.,
*Plaintiffs-Appellants,*

v.

MARTIN W. ESSEX, ET AL.,
*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

## MOTION TO AFFIRM

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**October Term, 1976**

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**Case No. 76-496**

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BENSON A. WOLMAN, ET AL.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

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## MOTION TO AFFIRM

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Defendants-Appellees, Martin W. Essex, Superintendent of Public Instruction of the State of Ohio, State Board of Education, Gertrude W. Donahey, Treasurer of Ohio, Thomas E. Ferguson, Auditor of Ohio, and the Board of Education of the City School District of Columbus, Ohio, pursuant to Rule 16 of the Rules of this Court, respectfully move that the final judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

## STATEMENT OF THE CASE

This is a direct appeal from the final judgment, entered July 21, 1976, by a District Court of three judges specially convened pursuant to 28 U.S.C. § 2284, dismissing appellants' complaint attacking the validity of Section 3317.06 of the Ohio Revised Code.

## THE STATUTE INVOLVED

Section 3317.06, *supra*, provides certain specified forms of assistance to students in non-public schools. The statute is set forth at pages A34 to A38 of the jurisdictional statement.

It was enacted following *Meek* v. *Pittenger*, 421 U.S. 349 (1975), to eliminate those forms of assistance which this Court found constitutionally objectionable in that case.

The statute requires the various school districts to: purchase secular textbooks which have been approved for use in the public schools and loan them to students attending non-public schools; purchase secular, neutral and non-ideological instructional materials and equipment which are used in the public schools and loan them to students attending non-public schools; provide certain specified diagnostic and health services to students attending non-public schools; provide certain specified auxiliary and remedial services to students attending non-public schools; supply standardized tests used in the public schools for the use of students attending non-public schools; and provide field trip transportation for students attending non-public schools.

The statute specifically provides that each of its provisions is independently and fully severable. See also: Section 1.50 of the Ohio Revised Code.

The statute limits the materials and services available to those which are available to students attending public



schools in the district; provides that the students, in order to be eligible to receive the materials or services, attend schools where admission and hiring policies make no distinction as to race, creed, color or national origin; and prohibits the provision of materials or equipment which are capable of diversion to religious use.

## PROCEEDINGS BELOW

Plaintiffs-appellants instituted a class action contending that Section 3317.06, *supra*, is a law respecting an establishment of religion which is prohibited by the First Amendment.

The District Court analyzed each provision of the statute under the principles established in *Meek* v. *Pittenger*, *supra*, 421 U.S. 349; and other applicable decisions of this Court. It found that each of the provisions is constitutional and that the plaintiffs' complaint was without merit. It, therefore, dismissed the complaint.

Appellants in their jurisdictional statement have conceded the validity of the physician, nursing, dental and optometric services provided under the statute. They have also conceded the validity of therapeutic, counselling and remedial services which are furnished in the public schools.

## ARGUMENT

### The Case Presents No Substantial Question Not Previously Decided By This Court.

Appellees respectfully submit that Section 3317.06, *supra*, is valid under the three part test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion." (403 U.S. at 612-613.) (Citations omitted.)

See also: *Roemer* v. *Bd. of Public Works,* ..... U.S. ....., 96 S.Ct. 2337, 2345 (1976); *Meek* v. *Pittenger, supra,* 421 U.S. at 358.

The statute does have a secular legislative purpose: to improve the quality of education throughout the state and to provide students with educational handicaps the opportunity to proceed at the same educational level as their more fortunate classmates.

The principal or primary effect of the statute neither advances nor inhibits religion. It makes available to all children in the state, those in non-public schools as well as public schools, benefits in the form of secular educational materials and health and remedial services. No benefits whatsoever are provided to sectarian schools.

The statute does not foster an excessive government entanglement with religion. The benefits available under the statute are provided to all students in the state. The only distinction between students attending non-public rather than public schools is the location where they receive the benefits. The risk of political entanglement is, therefore, minimal. If there is a demand in the future to increase the level of benefits, the proponents will be those who generally favor remedial and special educational benefits for students. Political debate on the question will not be drawn along religious lines.

There is also little risk of administrative entanglement. There is no need for continuing government surveillance. The textbooks, materials and equipment need be examined only once to insure that their content is secular and incapable of diversion to sectarian use.



No services which have any relation to the educational function of a sectarian school will be performed on the school premises. There is, therefore, no risk that the personnel rendering the services will be "affected by an atmosphere dedicated to the advancement of religious belief" and no temptation for the sectarian schools to compromise their religious mission.

Appellants in their jurisdictional statement attempt to distinguish the programs available under Section 3317.06, *supra*, from those which have previously been found valid by this Court. Appellees respectfully submit that the claimed distinctions have no legal significance.

**Textbooks**

The parties have stipulated that the textbooks available under the statute will be the same as those used in the public schools. The phrase "textbooks including book substitutes" is limited to books, reusable workbooks and manuals intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group.

This portion of the program is identical to that upheld in *Meek* v. *Pittenger, supra,* 421 U.S. at 354 n. 3.

**Instructional Materials And Equipment**

The benefit of this portion of the program is to the students and their parents. The sectarian schools receive no materials or equipment. They are loaned to the pupils or their parents upon individual request.

Appellants contend that the beneficiaries of the aid is constitutionally insignificant citing *Committee For Public Education* v. *Nyquist,* 413 U.S. 756 (1973).

Appellees submit that this contention is foreclosed by the decisions in *Meek* v. *Pittenger, supra,* 421 U.S. at 360; *Bd. of Education* v. *Allen,* 392 U.S. 236 (1968); and *Everson* v. *Bd. of Education,* 330 U.S. 1 (1947) and that the *Nyquist case* is distinguishable because of the form of the aid involved therein.

*Nyquist* involved financial aid for maintenance and repair of non-public school facilities and reimbursement grants and income tax credits for tuition to non-public schools. This type of aid either presents a risk of advancing religion or fosters excessive entanglements between church and state. In the absence of restrictions financial aid could be used to benefit either the educational or the religious functions of the sectarian schools. If there are such restrictions it would require continuing and intrusive government surveillance to insure that the restrictions were obeyed.

The benefits involved herein pose no such problem. The materials and equipment involved, like textbooks, are inherently secular and cannot be diverted to religious use. There is, therefore, no need for any government surveillance.

Appellents also contend that the program is invalid because the materials and equipment are not limited to items which can be distributed to individual pupils and because the materials may be stored on non-public school premises.

Appellees submit that neither of these facts have any legal significance. The textbooks will be available for individual use. Their only educational value, however,



comes from their group use in class. In fact the parties have stipulated that only those textbooks which are to be used as the principal source of study material for a given class or group, may be loaned.

The fact that the materials and equipment are stored on the school premises has no effect on the validity of the program. The same was true of the textbooks in both New York and Pennsylvania. *Meek* v. *Pittenger, supra,* 421 U.S. at 361 n. 9.

**Diagnostic Services**

Appellants concede the validity of the physician, nursing, dental and optometric services. They seek to distinguish psychological and speech and hearing diagnosis, apparently on the basis of the amount of communication involved between the student and the person performing the diagnosis.

The diagnostic services identify those students who have educational handicaps so that they might seek corrective treatment. They are public health services provided in common to all students in the state. They are secular and not related to the educational function of the schools that the handicapped students attend.

The previous decisions of this Court establish that such a program is constitutionally permissible. The state may properly include church related schools in general programs providing secular services, unrelated to the primary educational function of such schools. See, e.g., *Meek* v. *Pittenger, supra,* 421 U.S. at 364; *Lemon* v. *Kurtzman, supra,* 403 U.S. at 616. Nothing in the language or reasoning of any of the applicable decisions indicates that the validity of such services depends upon the amount of communication which they involve.

**Therapeutic And Remedial Services**

These services are provided in common to all students in the state who require special treatment or assistance. The school which such students attend is relevant only as to the location in which they will receive the services. Most students in the public schools will receive the services in the school they attend. Students in the non-public schools will receive the services in the public school, in a public center or in a mobile unit.

Appellants concede the validity of providing such services in public schools. They claim, however, that it is unconstitutional to provide such services to non-public school students in public centers or in mobile units. In support of their claim they state that when the services are provided in either public centers or mobile units, they might be rendered exclusively to students in sectarian schools. They also state that when the services are provided in mobile units the units may be stationed close to the premises of the non-public school.

This Court, in the *Meek case* held that Pennsylvania could not provide auxiliary services to sectarian schools. It found that there would be a constitutionally impermissible degree of entanglement between church and state in order for Pennsylvania to be certain that the auxiliary service personnel did not advance the religious mission of the schools in which they served. The opinion makes it clear that the risk that such personnel would attempt to foster religion and the resulting need for state surveillance arose because the services were provided in sectarian schools.

> But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. (421 U.S. at 371.)



Appellees submit that nothing in that case or in any of the other applicable decisions of this Court would justify a requirement that services not be provided to groups of students with similar religious beliefs. Such a requirement would be meaningless as a practical matter. These services are not provided in a group setting. The parties have stipulated that the services will usually be provided individually or to small groups of students who require similar treatment.

In addition there is no justification for such a requirement. It is unrealistic to assume that a person rendering a remedial or therapeutic service will be so affected by the religious beliefs of the students receiving the service that he would be tempted to advance those beliefs. Even if there were a possibility that the personnel would be so affected, it would not be affected in any way by the statute. The same possibility would exist whether the students attended public or non-public schools and whether the services were performed in a public school, public center or mobile unit.

The fact that the mobile units may be parked close to a non-public school has no effect on the validity of the services. Appellees respectfully submit that a restriction on access to the services for certain students merely because they choose to attend sectarian schools would raise serious problems under the free exercise clause.

Appellants also claim that a substantial portion of the public funds might be expended to construct public centers. The construction of such centers would appear to be permissible. See, e.g., *Hunt* v. *McNair*, 413 U.S. 734 (1973). However, that issue is not raised in the instant case. Nothing in the statute authorizes the expenditure of funds for capital improvements.

No therapeutic or remedial services will be provided on the premises of non-public schools in Ohio. The atmos-

phere in such schools could not affect the personnel. There would also be no possibility of provoking controversy between the auxiliary personnel and religious authorities over the services provided.

**Testing Services**

Local public school districts are permitted to supply to students in non-public schools those standardized tests and scoring services used in the public schools. The tests are used to measure the progress of the students in secular subjects.

The state may properly insist that all schools, non-public as well as public, meet certain minimum requirements as to the quality and nature of the curriculum. *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614; *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925). These tests furnish a non-intrusive means to determine whether these requirements are being satisfied.

Appellants claim that such testing is unconstitutional under *Levitt* v. *Committee For Public Education*, 413 U.S. 472 (1973). In *Levitt* the state provided direct money grants to non-public schools to reimburse them for certain state required services including testing. One constitutional defect in the program was the absence of any restriction to assure that the money would not be used for sectarian purposes. (413 U.S. at 477.) Another problem was that the tests were prepared by teachers under the authority of the sectarian institutions. This created the risk that the teachers would draft the tests with a view to advancing the religious beliefs of the sponsoring church. (413 U.S. at 480.)

Neither problem is present in the instant case. No financial aid is involved. The tests are prepared for, and used in, the public schools.



**Bus Transportation**

Appellants attempt to distinguish *Everson* v. *Bd. of Education*, *supra*, 330 U.S. 1, on the grounds that the transportation in that case was scheduled at regular morning and afternoon times and was less directly related to the educational program of the schools.

Appellees respectfully submit that furnishing transportation for field trips is no more directly related to the educational program than furnishing transportation for regular classroom work. They also submit that the timing of the transportation has no bearing on its validity. In Ohio as in New Jersey, the state merely enables parents to get their children safely and expeditiously to and from school.

## CONCLUSION

Appellees respectfully submit that the District Court, in its opinion, correctly followed and applied the principles established by the applicable decisions of this Court. The questions raised by this appeal are so unsubstantial as not to need further argument. Appellees respectfully move this Court to affirm the judgment of the District Court.

Respectfully submitted,

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# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-496**

BENSON A. WOLMAN, *et al.*,

***Appellants,***

—v.—

MARTIN W. ESSEX, *et al.*,

***Appellees.***

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

## BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM AND MOTION TO AFFIRM

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SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-496

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BENSON A. WOLMAN, et al.,

Appellants,

-vs-

MARTIN W. ESSEX, et al.,

Appellees.

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On Appeal From The United States District Court
For The Southern District of Ohio
Eastern Division

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# BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM AND MOTION TO AFFIRM

This brief opposes the Motion to Dismiss or Affirm filed by Appellees Grit, Kane, Kowloski and Shames, and the Motion to Affirm filed by the Superintendent of Public Instruction and other public appellees.

Nationwide Concern

The Motion to Dismiss or Affirm filed by the parental appellees urges that this case is not of nationwide concern (pp. 4-8). These appellees argue that this case is unimportant because "legislation similar to the Ohio Act won't solve... [nonpublic school] financial problems" (Id. at 4) and that the Federal Elementary and Secondary Education Act provides "similar services" (Id. at 6). These positions make no sense.

The fact that testing and auxiliary services and materials programs would not solve the full financial problem of the religious schools did not dissuade this Court from adjudicating the constitutionality of such programs in cases such as Meek v. Pittenger, 421 U.S. 349 (1975) and Levitt v. Committee for Public Education, 413 U.S. 472 (1973). And the fact that this appeal may touch issues which remain undecided after Wheeler v. Barrera, 417 U.S. 402 (1974), 1/ concerning the validity of certain programs under the Elementary and Secondary Education Act,

1/ See Motion to Dismiss or Affirm, p. 6. In Wheeler v. Barrera, this Court expressly left open the extent of the First Amendment problems created by the ESEA, and acknowledged that particular programs which might be introduced under the broad mandate of the federal law might pose considerable difficulties. See 417 U.S. at 425-26.



is hardly a reason for declining to grant plenary review to this appeal.

Appellees have not refuted appellants' contention that the Ohio enactment herein challenged represents an important evolutionary development in parochial assistance legislation which has the effect of authorizing programs which are effectively identical to those stricken down in Meek v. Pittenger. This Court has not shrunk from adjudicating the constitutionality of such programs.

Education Materials and Equipment

The appellees suggest that in Meek v. Pittenger textbook loans were approved while equipment and material loans were invalidated merely because of the nominal identity of the borrower: textbooks were loaned to pupils and the other items were loaned to the schools. See Motion to Dismiss, p. 6; Motion to Dismiss or Affirm, pp. 9-10. The result of the acceptance of this interpretation of Meek would be that a wall map or a laboratory could not be loaned to a nonpublic school, but that it could be loaned to the student body and kept at the nonpublic school. Appellees urge that this proposition flows ineluctably from Meek and other prior adjudications of this Court under the Establishment Clause, so that there is no need to note jurisdiction in this case. To the contrary, in view of this Court's insistence that parochial assistance programs must be measured by their substance, and that "a legalistic minuet" is to be avoided, Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), appellants submit that review

by this Court is essential in order to mark out the boundaries of the child-benefit theory and explain the true basis for the distinction between the treatment accorded to textbook loans and equipment and materials loans in Meek.

Health, Diagnostic and Remedial Services

The provisions in Ohio's current enactment which establish diagnostic and remedial services to be furnished for the parochial student bodies by public personnel also present new configurations which require dispositive review by this Court. These programs too achieve by indirection that which Meek prohibited.

By separating the types of services stricken down in Meek into diagnostic and remedial categories, and providing the latter off the sectarian premises, the Ohio law presents several novel questions. For example: whether diagnostic services stand on a different footing from remedial services for First Amendment purposes so that while counseling services and the like cannot be provided under Meek, such programs as psychological diagnosis are to be permitted; whether the movement of a remedial reading program from the interior of a church school (where Meek instructs such a program cannot be conducted) a few yards to a mobile unit parked at the curb somehow erases the problems of aid to religion and excessive entanglement which have heretofore prevented such programs from passing constitutional muster; and whether the creation of special programs for parochial school pupils at sites which, though publicly owned, are not



similarly employed for public school pupils, impermissibly effects aid to a sectarian class. Cf. Committee for Public Education v. Nyquist, 413 U.S. 756, 783 n. 38 (1973).

* * * * *

Appellants submit that the positions which they have taken on the issues mentioned above and the many subsidiary issues which are encompassed in this litigation are in keeping with the previous holdings of this Court from Lemon v. Kurtzman to Meek v. Pittenger and that reversal of the decision below is required. However, even if appellants are in one or more respects, wide of the mark in their contentions, full review by this Court is required. The notion expressed in appellees' respective motions for summary disposition of this matter, that this appeal presents nothing novel of importance for this Court's adjudication, is clearly simplistic.

The questions alluded to above are substantial; and they most obviously have not been resolved by prior decisions of this Court.

## CONCLUSION

For the foregoing reasons, appellants respectfully urge this Court to note jurisdiction.

Respectfully submitted,

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# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-496**

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*Appellants,*

—v.—

MARTIN W. ESSEX, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

## BRIEF FOR APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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## BRIEF FOR APPELLANTS

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### Citations to Opinions Below

The opinion of the three-judge District Court for the Southern District of Ohio, Eastern Division, from which this appeal is directly taken, is reported as *Wolman* v. *Essex,* 417 F. Supp. 1113 (S.D. Ohio 1976) and is reproduced in the Appendix to the Jurisdictional Statement (hereinafter abbreviated "J. S. App.") at pp. A. 2-33.

### Statement of Jurisdiction

Appellants, citizens and taxpayers of Ohio and the United States, filed their complaint in the District Court on November 18, 1975, alleging that a state statute, Ohio Revised

Code §3317.06,[1] violates the First and Fourteenth Amendments of the United States Constitution by effecting an establishment of religion. The complaint demanded preliminary and permanent injunctions against the enforcement of the statute, as well as other relief.

On December 22, 1975, pursuant to 28 U.S.C. §2284, a three-judge court was convened to hear and determine the suit.

The judgment sought to be reviewed was entered by the three-judge district court below on July 21, 1976, upholding the constitutionality of the state statute and denying an injunction against its enforcement. Notice of appeal to this Court was filed in the District Court on August 10, 1976.

Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. §§1253 and 2281, and standing is established under *Flast* v. *Cohen*, 392 U.S. 83 (1968).

## Constitutional Provisions and Statutes Involved

***United States Constitution***

Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . "

Amendment XIV, Section 1:

" . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . "

[1] Hereinafter usually referred to as "SB 170."



***Ohio Revised Code***

Section 3317.06 (usually referred to herein as SB 170) is appended to this Brief at pp. 1a-6a, *infra*.

## Questions Presented

1. Does a state statute which provides for the expenditure of public funds to furnish auxiliary materials and equipment for use within sectarian schools, including materials and equipment which cannot be loaned to such schools without violating the Establishment Clause of the First Amendment, satisfy the requirements of the Establishment Clause by authorizing the lending of such materials and equipment to the pupils and parents of pupils enrolled in such schools where such statute permits the materials and equipment to be stored on the sectarian premises and serviced there by public personnel, and where the materials and equipment so loaned include items which cannot practicably be distributed to individual pupils, but will be loaned to them as a group?

2. Does a state statute which provides for the expenditure of public funds to furnish diagnostic services, which include speech and hearing services and psychological services,[2] on the premises of private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

3. Does a state statute which provides for the expenditure of public funds to furnish therapeutic and remedial services, guidance and counseling and other programs, includ-

[2] As well as physician, nursing, dental, and optometric services which are not challenged in this suit.

ing services and programs which cannot be publicly provided on sectarian premises without violating the Establishment Clause of the First Amendment, satisfy the requirements of the Establishment Clause by authorizing the performance of such services by public personnel at locations off the sectarian premises which include mobile units parked nearby, and undefined public centers including centers used for such purposes only for the benefit of the sectarian beneficiaries of the services?

4. Does a state statute which provides for the expenditure of public funds to furnish standardized tests and scoring services for use in private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

5. Does a state statute which provides for the expenditure of public funds to furnish field trip transportation to classes attending private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

6. Does a state statute which provides for the expenditure of public funds to lend textbooks to pupils or parents of pupils attending private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

## Statement of the Case

### A. *History.*

This action challenges the validity, under the Establishment Clause of the First Amendment, of SB 170 enacted by the General Assembly of Ohio and signed into law on



August 29, 1975. The substantive provisions of SB 170 are codified at Ohio Revised Code §3317.06.

Appellants filed their complaint in the United States District Court for the Southern District of Ohio on November 18, 1975, seeking a declaratory judgment and injunctive relief against the implementation of SB 170 on the grounds that its provisions effected impermissible aid to religious nonpublic schools, in violation of the Establishment Clause (Complaint, A. 4-14).

The defendants consisted of the Superintendent of Public Instruction, who is the chief executive and administrative officer of Ohio's Department of Education, and chief administrative officer of the State Board of Education; the State Board of Education as an entity; the Treasurer and the Auditor of Ohio; the Board of Education of the City School District of Columbus, Ohio; and the parents of several pupils enrolled in sectarian nonpublic schools (A. 6-8).

On motion of the plaintiffs, the District Court granted a temporary restraining order, on December 19, 1975, restraining the implementation of the Act. The restraining order was modified by consent order of February 13, 1976, to permit textbooks to be purchased from public funds and loaned to pupils of nonpublic schools or their parents to the extent such textbook loans had been held constitutional by this Court.[3]

The separate answers of the public and parental defendants filed December 9, 1975 and January 16, 1976, gen-

[3] *Meek* v. *Pittenger*, 421 U.S. 349, 362 (1975). The restraining order was dissolved when the court below entered judgment for defendants. Appendix (hereinafter "A.") 3.

erally denied the constitutional claims of the plaintiffs (A. 16-20, 21-24).

On December 22, 1975, pursuant to 28 U.S.C. §2284, a three-judge court was convened to hear and determine the suit (A. 2).[4]

A comprehensive factual stipulation was agreed to by the parties and filed on March 16, 1976 (A. 25-71). On June 1, 1976, the three-judge court heard the case on the pleadings, the stipulation, and the briefs and arguments of counsel; and on July 21, 1976, the District Court announced its decision and opinion upholding the Establishment Clause validity of the Act[5] (A. 3).

On August 10, 1976, the plaintiffs filed their notice of appeal to this Court (A. 3). This Court noted probable jurisdiction on January 10, 1977.

**B. *Summary of the Statutory Provisions.***

The provisions of the Act, which in its entirety is appended to this Brief (at pp. 1a-6a, *infra*), will be discussed in detail in the relevant portions of the Argument. In essence Section 3317.06 requires Ohio's school districts to use moneys paid to them from the state treasury[6] for the purposes set forth in Sections A through L of the statute.

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[4] The initial designation, consisting of Hon. John W. Peck, Circuit Judge, and Hon. Carl B. Rubin and Joseph P. Kinneary, District Judges, was amended by order dated May 19, 1976, substituting Hon. Robert M. Duncan, District Judge, for Judge Rubin (A. 2).

[5] The opinion and order, being appended to the Jurisdictional Statement (J.S. App. pp. 1-33), are omitted from the Appendix.

[6] Pursuant to Section 3317.024 Ohio Rev. Code appended hereto at p. 9a, *infra*. Section 3317.024 is part of Ohio's Foundation program under which state funds supplement the essentially local funding of the school districts.



Section A requires the school districts "to purchase such secular textbooks as have been approved by the Superintendent of Public Instruction for use in public schools in the state and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents. . . . "

Section B requires school districts "to purchase and to loan to pupils attending nonpublic school . . . or to their parents upon individual request, such secular, neutral and nonideological instructional materials as are in use in the public schools within the district and which are incapable of diversion to religious use and to hire clerical personnel to administer such lending program."

Section C is identical to Section B, except that it provides for the purchase and loan of instructional equipment instead of materials.

Section D calls for the provision of "speech and hearing diagnostic services to pupils attending nonpublic schools . . . . Such services shall be provided in the nonpublic school attended by the pupil receiving the service."

Section E provides for "physician, nursing, dental and optometric services" within the nonpublic schools.

Section F provides for "diagnostic psychological services" within the nonpublic schools.

Section G provides for "therapeutic psychological and speech and hearing services to pupils attending nonpublic schools within the district." Unlike the diagnostic services these services are to be "provided in the public school, in public centers, or in mobile units located off of the non-

public premises as determined by the state department of education." Transportation to public schools or public centers at public expense is authorized.

Section H provides for "guidance and counseling services" to be performed in public schools, public centers or mobile units, in terms similar to those employed in Section G.

Section I provides for "remedial services" to be performed in public schools, public centers or mobile units, in terms similar to those employed in the two next preceding sections.

Section J requires the districts "to supply for use by pupils attending nonpublic schools . . . such standardized tests and scoring services as are in use in the public schools of the state."

Section K authorizes "programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district." These, like the other remedial and therapeutic programs, are to be furnished in public schools, public centers or mobile units.

Section L provides for field trip transportation.

Subsequent unlettered sections flesh out administrative and fiscal detail. Most pertinently:

> "The duties of clerical personnel, hired pursuant to divisions (B) and (C) of this section, shall include distribution of loan request forms, receipt and cataloging of loan requests, inventory of instructional materials and instructional equipment, distribution of instructional materials and instructional equipment to pupils or their parents, retrieval of such instructional materials and instructional equipment, and maintaining custody and storage of these items. The instructional material and instructional equipment authorized to be loaned pursuant to divisions (B) and (C) of this section may be stored on the premises of the nonpublic school of attendance and the clerical personnel hired for administration of the lending program may perform their services upon the premises of the nonpublic school when in the determination of the state department of education, it is necessary and appropriate for efficient implementation of the lending program."



The remainder of the provisions of the Act limit benefits to those which are available to pupils attending the public schools within the district; require the furnishing of benefits, the admission of students and the hiring of faculty to be nondiscriminatory as to race, creed, color or national origin; prohibit the provision of services, materials or equipment for use in religious courses, devotional exercises, religious training, or any other religious activity; and provide funding limitations. (See pp. 5a-6a, *infra*.[7])

The State Department of Education is authorized to adopt guidelines and procedures for implementation of the Act (see p. 6a, *infra*), and has done so. The guidelines are appended to the stipulated record (A. 51-60, Ex. B).

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[7] Allocation of funds is based on the State Board of Education's estimated annual average daily membership in the nonpublic schools located in the district (pp. 5a-6a, *infra*).

C. *The Stipulated Facts.*

**1. Standing and Procedure.**

The standing of the plaintiffs as citizens and taxpayers of the United States and the State of Ohio is stipulated (A. 26, S. 1),[8] as is the status of the public and nonpublic defendants (A. 26, S. 2, 3), and the due adoption of the statute and the guidelines (A. 26-27, S. 4, 5).

**2. The Appropriated Funding.**

The initial appropriation to implement the nonpublic education benefits of the Act was $88,800,000 for the 1975-76 biennium (A. 27, S. 6).

**3. Nonpublic Education in Ohio.**

There were 720 chartered nonpublic schools in Ohio during the 1974-75 school year (A. 28-29, S. 10). Of these, 657 were Catholic (*Ibid.*) and all but 29 were sectarian (*Ibid.*). During this period more than 96% of the nonpublic enrollment attended sectarian schools and more than 92% attended Catholic schools (*Ibid.*).

It is stipulated that if called to testify, officials of the Catholic schools of the Diocese of Columbus, which are fairly representative of such schools throughout Ohio,[9] would testify that such schools are generally conducted in facilities owned or leased by the diocesan Bishop or a religious order (A. 30, S. 13 (a)-(b));[10] that most principals

[8] References to the stipulation indicate the page number of the appendix and the paragraph number of the stipulation.

[9] A. 30, S. 13 (a)-(b).

[10] The responsibilities of the bishop, the vicar episcopal for education and the pastor, *inter alia*, for the governance of the Catholic schools, are stated in the Diocesan Manual excerpted at A. 61-66. See A. 30, S. 13 (a).



are members of a religious order within the Church (A. 30, S. 13 (c)); that almost one-third of the teachers are priests, nuns, or other members of religious orders who have taken vows of obedience to the Church (A. 30-31, S. 13 (d)); that many of the classrooms, hallways and assembly areas of these schools are adorned with Christian symbols (*Id.* at e); that secular classes are taught in such rooms (*Ibid.*); that all teachers and administrators within the schools are employees of the schools (*Id.* at f); that religious exercises and practices are conducted during the school day (A. 31-32, S. 13 (g)); and that during religious classes pupils are taught sectarian views on topics of social concern such as marriage, divorce, family planning, sexual morality, abortion and sterilization (A. 32, S. 13 (i)). While it is stipulated that teachers of secular subjects include members of many different faiths and sects, in all probability the majority are Catholic (A. 33, S. 13 (j)).[11]

The Court below concluded that

> "[a]lthough the stipulations of the parties evidence several significant points of distinction, the character of these schools is substantially comparable to that of the schools involved in *Lemon* v. *Kurtzman*, 403 U.S. 602, 615-18 (1971)" (footnote omitted). *Wolman* v. *Essex*, 417 F. Supp. 1113, 1116 (S.D. Ohio 1976).

The record concerning the character of nonpublic education in Ohio has not materially changed from the record developed in previous litigation which has reached this Court concerning Ohio parochial assistance laws, and upon which this Court has found the Establishment Clause to

[11] This description of the stipulation is not intended to be exhaustive. See A. 28-33, S. 10-13.

have been violated. See *Kosydar* v. *Wolman,* 353 F. Supp. 744 (S.D. Ohio 1973) aff'd sub nom. *Grit* v. *Wolman,* 413 U.S. 901 (1973); *Wolman* v. *Essex,* 342 F. Supp. 399 (S.D. Ohio 1972) aff'd 409 U.S. 808 (1972).

Indeed, while the appellees did not concede that every aspect of the profile of sectarian schools described in this Court's opinion in *Meek* v. *Pittenger,* 421 U.S. 349, 356, 366 (1975), is factually applicable to Ohio's parochial schools, they have not argued that this Court's decisions on sectarian elementary and secondary schools in other states are in any way inapplicable in Ohio.

### D. *Implementation of the Act*

The general mechanical operation of the statute is described in the Stipulation (A. 33-35, S. 14-16). Most significantly, the Act is administered locally through more than 620 public school districts throughout Ohio (A. 34-35, S. 15). The local districts approve services or materials requested by nonpublic school representatives after consultation with one of thirty-three Department of Education coordinators (*Ibid.*).

The methods of implementing the various specific programs as of the development of the record below are described in the Stipulation (A. 35-49, S. 17-38). In view of their prolixity these stipulated facts will be discussed in the portions of the Argument to which they pertain.

Finally, it is stipulated that because the "new law has not been implemented . . . the stipulation can only go to the intent and policies of the Department of Education rather than to the precise manner in which that intent of policy will or will not be carried out in all instances." (A. 49, S. 39).



### E. *The Holding Below*

The District Court ruled, in essence, that the textbook loan provisions were indistinguishable from those upheld by previous decisions of this Court (417 F. Supp. at 1117); that the lending of instructional materials and equipment was not substantively different from the lending of textbooks (*Id.* at 1119); that the challenged diagnostic services were constitutional because they were health services involving limited pupil contact (*Id.* at 1121); that the removal of therapeutic services from parochial school premises cured First Amendment difficulties (*Id.* at 1123); that the testing and scoring services were valid by reason of standardization (*Id.* at 1124); and that field trip transportation was not different from the busing between home and school previously approved by this Court (*Id.* at 1124-1125). It therefore upheld the enactment.

## Summary of Argument

1. The provisions of Sections B and C of the Act, which authorize the lending of instructional equipment and materials to pupils attending nonpublic schools or their parents, and which permit the equipment and materials to be stored on parochial school premises and serviced by public personnel, are not significantly different from the provisions of the Pennsylvania and Michigan laws, invalidated in *Meek* v. *Pittenger,* 421 U.S. 349 (1975), and *Public Funds for Public Schools* v. *Marburger,* 358 F. Supp. 29 (N.J. Dist. 1973), aff'd 417 U.S. 961 (1974), under which similar equipment and materials were loaned. There are only two notable differences between the statutory schemes. First, Ohio's law contains an express prohibi-

tion against lending items capable of diversion to religious use, whereas the Pennsylvania and Michigan laws had no such clause; but the ruling of the district court in *Meek* effectively imposed such a limitation, and this Court held the limitation to be insufficient to save the statute. *Meek* v. *Pittenger, supra.* Second, Ohio's law provides for the loan to pupils and parents rather than schools. However, given the nature of the items loaned and the surrounding circumstances the pupil-loan concept is a mere sham, and the pupils and parents must be regarded as a conduit to the school. Moreover, because the lending of equipment and materials under SB 170 is not limited to items which can be loaned to individual children, the analogy to textbook loans approved by this Court is inapropos.

2. The diagnostic psychological and speech and hearing services authorized to be conducted on parochial school premises under Sections D and F of the Act are subject to the same infirmity as the similar remedial and counseling programs stricken down in *Meek* and *Marburger*. The fact that these programs are "diagnostic" may slightly lessen, but does not eliminate, the need for impermissible public surveillance. Because of the amount of communication which these services would engender between the public personnel and the pupils, they are more like remedial and counseling services than like medical, nursing or similar non-educational health services which appear to be permitted under the Establishment Clause, and which have not been challenged in this suit.

3. The remedial and therapeutic services authorized by Sections G, H, I and K of the Act include services such



as remedial reading, guidance counseling and programs for the disturbed, which could not be performed on parochial school premises under *Meek* and *Marburger*. The Act requires them to be furnished off the nonpublic premises in three types of locations: public schools, public centers and mobile units parked near the parochial school. Insofar as the services are to be performed in public schools as part of a general program for public and nonpublic pupils, these provisions are not facially challenged. However, insofar as the Act merely moves the programs from within the school to the curbside or a public annex to a religious institution, it does not erase the potential for sectarian influence condemned in previous decisions. And to the extent the Act permits public facilities to be used for special purposes for parochial school pupils, as distinct from the general community, it improperly confers a special benefit on a sectarian class.

4. Section J of the Act, which requires the school districts to supply standardized tests and scoring services for use in parochial schools, is invalid upon the grounds set forth in *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973). Although, unlike the teacher-prepared tests involved in *Levitt,* these tests are standardized, they remain "an integral part of the teaching process"; they are not loaned to individual pupils; and they are not neutral health services. Therefore, they cannot be furnished at public expense.

5. The field-trip transportation authorized by Section L of the Act is materially different from the busing approved in *Everson* v. *Board of Education,* 330 U.S. 1 (1974). It is stipulated that purpose of the field trip

transportation is "to enrich the secular studies of students." Moreover, the potential scheduling conflicts among schools desiring to use transportation facilities provides much greater potential for entanglement than does commuter busing between school and home.

6. The textbook loan provisions of Section A of the Act are broader than those approved in *Board of Education* v. *Allen,* 392 U.S. 236 (1968), and *Meek* v. *Pittenger, supra.* Section A permits the lending of "book substitutes" which could include auxiliary materials prohibited in *Meek* and *Marburger.* The stipulated contrary present intention of state education officials is an inadequate safeguard to prevent this result. Moreover, insofar as *Board of Education* v. *Allen, supra,* and *Meek* v. *Pittenger, supra,* permit such textbook loans, these decisions should be overruled as inconsistent with Establishment Clause strictures.

7. The massive and increasing Aid provided by SB 170 (now more than $88 million), fosters excessive political divisiveness as condemned by recent decisions of this Court.



## ARGUMENT

### Introduction—The General Scheme of SB 170 Compared With Previously Adjudicated Auxiliary Services and Materials Programs.

On May 19, 1975 this Court announced its opinion striking down Pennsylvania's statutory program for the furnishing of auxiliary services and instructional materials to nonpublic schools. *Meek* v. *Pittenger,* 421 U.S. 349 (1975). In *Meek* this Court noted that its earlier affirmance of a district court decision invalidating a similar Michigan law[12] was entitled to "precedential weight." 421 U.S. at 370 n. 20.

At the time of this Court's holding in *Meek,* the appellants' challenge to former Ohio Revised Code §3317.062, then in effect, which provided programs similar to those considered in *Meek* and *Marburger,* was pending on appeal to this Court. On May 27, 1975, this Court vacated the District Court's judgment which had upheld §3317.062[13] and remanded the cause for further consideration in the light of *Meek* v. *Pittenger, supra. Wolman* v. *Essex,* 421 U.S. 982 (1975). On remand, on November 17, 1975, the District Court entered a consent order in which it expressly found that there were no constitutionally significant differences between the provisions of the Pennsylvania legislation invalidated in *Meek* and those contained in the former Ohio Act, and declared that it violated the Establishment Clause of the First Amendment.[14]

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[12] *Public Funds for Public Schools* v. *Marburger,* 358 F. Supp. 20 (N.J. Dist. 1973), aff'd 417 U.S. 961 (1974).

[13] *Wolman* v. *Essex, supra,* S.D. Ohio No. 73-292 (July 1, 1974).

[14] *Ibid.* The consent order was entered November 17, 1975.

S.B. 170, challenged in this action, *inter alia,* repealed the doomed provisions of former Section 3317.062 and replaced them with the revised and expanded provisions of Ohio Revised Code Section 3317.06.

The issues presented in this case are put into perspective by a brief delineation of the fundamental differences between the former law invalidated by *Meek* v. *Pittenger* and the new law. As the ensuing paragraphs will document: first, the instructional materials and equipment which were formerly furnished to the nonpublic schools are now ostensibly loaned to the pupils or their parents. Second, the services are broadly dichotomized into diagnostic and remedial or therapeutic services. Diagnostic services are furnished within the nonpublic schools and remedial or therapeutic services are furnished in public schools, public centers or mobile units stationed off the nonpublic property. Provisions for textbook loans and specific health services including physician, nursing, dental and optometric services, which were not expressly authorized under the former law, have been added; while other services, including speech and hearing, psychological, guidance counseling, remedial services and programs for the handicapped, which had close counterparts in the former law, are carried into the new law. In some instances these have been divided into diagnostic and therapeutic components as described above. Compare, former Ohio Revised Code §3317.062 (*infra* at pp. 7a-8a), and Ohio Revised Code §3317.06 (*infra* at pp. 1a-6a).

Appellants contend that except insofar as certain specific neutral health services are offered (including the "physician, nursing, dental and optometric services" authorized



by Section E), the Act is based upon differences from the programs stricken down in *Meek* and *Marburger* which are constitutionally insignificant.

## I.

### The Instructional Materials and Equipment Loan Provisions of SB 170 Violate the Establishment Clause.

This appeal challenges the Establishment Clause validity of Ohio's latest legislative effort to channel massive aid to the parochial schools within its borders, all previous efforts (except for busing) having been declared invalid. *Wolman* v. *Essex,* 342 F. Supp. 399 (S.D. Ohio 1972), aff'd 409 U.S. 808 (1972) (tuition reimbursements); *Kosydar* v. *Wolman,* 353 F. Supp. 744 (S.D. Ohio 1973), aff'd *sub nom. Grit* v. *Wolman,* 413 U.S. 901 (1973) (tax credits); *Wolman* v. *Essex,* U.S. Dist. Ct. S.D. Ohio No. 73-292 (July 1 1974), vacated and remanded 421 U.S. 982 (1975) (auxiliary services and materials).[15]

Recent decisions of this Court have repeatedly measured state laws challenged under the First Amendment's injunction against laws "respecting an establishment of religion"[16] against a three-part test.

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be

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[15] Ohio's earlier salary-supplement law was repealed and replaced by a tuition reimbursement program in the wake of the holding of *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971) holding such programs unconstitutional.

[16] Made applicable to the states by the Fourteenth Amendment. See *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940).

one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-13 (1971) quoting *Walz* v. *Tax Commission,* 397 U.S. 664, 674 (1970); see also *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 772-73 (1973).

The most recent application of this three-part test to a statutory scheme of assistance to parochial grade schools involved programs which closely resemble Ohio's programs challenged here. In *Meek* v. *Pittenger,* 421 U.S. 349 (1975), this Court invalidated Pennsylvania's statutory program for furnishing instructional materials and equipment. *Id.* at 366. The Pennsylvania law defined instructional equipment and materials in such a way as to include substantially the same equipment and materials which can be furnished as auxiliary materials and equipment under S.B. 170. The definition of "equipment" in the Pennsylvania act included

"projection equipment, recording equipment, laboratory equipment, and any other educational secular, neutral, non-ideological equipment . . ." 421 U.S. at 354 n. 4.

The definition of "materials" included:

"books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, films, filmstrips, kinescopes and video tapes, or any other printed and published materials of a similar nature. . . . The term includes such other secular, neutral, non-ideological



materials as are of benefit to the instruction of non-public school children and are presently or hereafter provided for public school children of the Commonwealth." *Ibid.*

Exhibit D of the Stipulation (A. 67-71, S. 21) is a list of materials and equipment available under SB 170. This exhibit consists of a compilation of the equipment and materials which were actually furnished in selected school districts under the invalidated predecessor statute. It is stipulated that

"[i]t is expected that materials and equipment loaned to pupils or parents under the new law will be similar to such former materials and equipment except to the extent that the law requires that materials and equipment capable of diversion to religious issues will not be supplied."[17] *Ibid.*

Exhibit D discloses that virtually all the items available under the Pennsylvania instructional equipment and material provisions invalidated in *Meek* are available under Sections B and C of SB 170.

The only noteworthy differences between Sections B and C of Ohio's law and the invalid provisions considered in *Meek* are that (i) Ohio's enactment expressly provides that only materials and equipment which are "incapable of diversion to religious use" may be furnished; and (ii) the materials and equipment are ostensibly "loaned" to the pupils or their parents, rather than loaned to the non-

[17] This section of the stipulations further recites that "[p]laintiffs reserve the right to argue that the two stated differences are not significant and that the restriction against supplying materials and equipment incapable of religious diversion cannot in fact be implemented." A. 36, S. 21.

public school. For the reasons stated in the ensuing paragraphs, neither of these differences is material to the validity of the Act under the Establishment Clause, and *Meek* v. *Pittenger* and other decisions of this Court require invalidation of SB 170.

**A. *Meek v. Pittenger held that equipment and material loans aid religious activity.***

In *Meek*, this Court noted that "[a]lthough textbooks are lent only to students, [the Pennsylvania law] . . . authorizes the loan of instructional material and equipment directly to qualifying nonpublic . . . schools. . . ." 421 U.S. at 362-63. This Court rejected the attempted justification of these programs as benefiting only the secular portion of the nonpublic curriculum.

> "[T]he massive aid provided the church-related nonpublic schools of Pennsylvania by Act 195 is neither indirect nor incidental." *Id.* at 365.
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> " . . . To be sure, the material and equipment that are the subjects of the loan—maps, charts, and laboratory equipment, for example—are 'self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use.' [*Meek* v. *Pittenger*] 374 F. Supp., at 660. But faced with the substantial amounts of direct support authorized by Act 195, *it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian.* Even



> though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion. *Hunt* v. *McNair*, 413 U.S. 734, . . . ." *Id.* at 365-66. (Emphasis added.)
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> "The church-related elementary and secondary schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon* v. *Kurtzman*, 403 U.S., at 616-617. *Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole.* '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' *Id.*, at 657 (opinion of Brennan, J.). See generally Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1688-1689. For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, *even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial ad-*

*vancement of religious activity, cf. Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U.S., at 781-783, n. 39, and thus constitutes an impermissible establishment of religion." *Id.* at 365-66. (Emphasis added; footnote deleted.)

This Court observed that its holding, as quoted above, was "directly supported, if not compelled" by its affirmance of *Public Funds for Public Schools* v. *Marburger,* 358 F. Supp. 29 (N.J. Dist. 1973), aff'd 417 U.S. 961 (1974), holding New Jersey's similar programs to be unconstitutional.

Because "the direct loan of instructional material and equipment to church-related schools has the impermissible effect of advancing religion" (421 U.S. at 364 n. 13), this Court concluded that "there is no need to consider whether such aid would result in excessive entanglement of the Commonwealth with religion through 'comprehensive, discriminating, and continuing state surveillance.'" *Ibid.* However, it noted that the district courts below in *Meek* and in *Marburger* had held that "excessive entanglement of church and state would result from attempts to police use of material and equipment that were readily divertible to religious uses"; and that the "affirmance of the result in *Marburger* was a decision on the merits, entitled to precedential weight." 421 U.S. at 366 n. 16.

Unless some distinguishing feature were to appear constitutionally significant, it must be concluded that *Meek* v. *Pittenger,* as well as the affirmance of *Marburger,* requires the overturning of the instructional materials and equipment sections of Ohio's latest enactment.



**B. *The bare statutory restriction to materials and equipment incapable of diversion to religious use is insignificant and was effectively rejected in Meek v. Pittenger.***

While Ohio's SB 170 expressly contains a restriction against furnishing materials and equipment readily capable of diversion to religious use in the body of the Act, whereas the Pennsylvania law did not, the efficacy of such a restriction to save the measure from First Amendment challenge was explicitly rejected in *Meek* v. *Pittenger.* The district court in *Meek*[18] had held the furnishing of instructional materials and equipment to be constitutionally acceptable except to the extent that the statute authorized the loan of equipment "which from its nature can be diverted to religious purposes" (421 U.S. at 357), which the district court considered to include such items as "projection and recording equipment." *Ibid.*

Thus, when *Meek* reached this Court, only the supplying of instructional equipment and materials ostensibly incapable of religious diversion was at issue. This Court so noted at 421 U.S. 357 n. 7. In reversing the portion of the decision below which had upheld the furnishing of equipment apparently incapable of diversion, this Court ruled against the lending of such items as maps, charts and laboratory equipment as well as projectors and tape recorders. Given the lower court's holding in *Meek,* the Pennsylvania materials and equipment loan provisions were decisionally limited in precisely the same manner in which the Ohio Act is limited by its language. Therefore, the statutory restriction requiring that loans be limited

[18] The district court in the previous Ohio litigation ruled to the same effect. See *Wolman* v. *Essex,* U.S. Dist. Ct. N.D. Ohio No. 73-292 (July 1, 1974), vacated and remanded 421 U.S. 982 (1975).

to materials and equipment incapable of diversion adds no new element to distinguish this case from *Meek* or *Marburger*.

**C. *The fact that the materials and equipment are to be ostensibly loaned to pupils or parents is a constitutionally insignificant sham.***

The Distirct Court below found that the distinction between lending materials and equipment to parochial schools and lending them to the student body was constitutionally decisive and approved this portion of SB 170 on that basis. 417 F. Supp. at 1118-19. However, in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), this Court noted that:

> "[t]here can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools. . . . In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." 413 U.S. at 780.
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> "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools . . . The effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Ibid.*

While SB 170 purports to limit the aid to so-called secular, neutral and nonideological materials and equipment, the



teaching of *Meek* v. *Pittenger* is that the effort to limit aid to the secular portion of the school's program is illusory in view of the "pervasive" and "inextricably intertwined" character of the religious involvement of the parochial schools. 421 U.S. at 366; and see *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973).[19] For this reason the legislative feint of lending to students and parents does not alter the result decreed in *Meek*.

Similarly, in *Wolman* v. *Essex*, 342 F. Supp. 399 (S.D. Ohio E.D. 1972), aff'd 409 U.S. 808 (1972), this Court affirmed the district court's conclusion that tuition reimbursements to parents of parochial school pupils stood on no different footing than the teachers' salary supplements or arrangements for the purchase of secular education services from parochial schools previously condemned in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). In refusing to accept the First Amendment efficacy of aid by indirection, the district court had said:

> "it is true that a parental reimbursement program providing for transportation expenses was upheld in *Everson;* and that a similar scheme providing textbooks was allowed in *Allen*. These cases do not, however, establish that a 'conduit' device may be used as a means of avoiding the First Amendment. *Everson* and *Allen* were not upheld merely because they provided reimbursement aid to parents and students, but because the aid provided was ideologically neutral

[19] It is this pervasive sectarianism, as well as the greater vulnerability of grade school pupils to indoctrination, which distinguishes cases such as this from cases approving aid to the separate secular functions of sect-sponsored colleges and universities. See *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Roemer* v. *Board of Public Works*, —— U.S. ——, 96 S. Ct. 2337 (1976).

and supplied in common to the entire class of students of public and parochial schools alike." 342 F. Supp. at 415.

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"We conclude that it is of no constitutional significance that state aid goes indirectly to denominational schools . . . through the medium of parental grants. Since the potential ultimate effect of the scheme is to aid religious enterprises, the Establishment Clause forbids its implementation regardless of the form adopted in the statute for achieving that purpose." *Id.* at 417. See also *Sloan* v. *Lemon,* 413 U.S. 825 (1973).[20]

The lending of instructional equipment and materials is not practically analogous to the lending of textbooks approved in *Board of Education* v. *Allen, supra,* and *Meek* v. *Pittenger.* This is true not only by virtue of the reasoning presented in the preceding paragraphs but also because of the practical differences between books and materials and equipment—differences which are accentuated by provisions for storage and servicing of the equipment and materials—which reduce the pupil loan concept to fiction. Under the statute, as it is worded and as it will be implemented, there is no difference between a loan to the pupils or parents and a loan to the school.

First, the materials and equipment to be loaned are not limited to items which can be practicably distributed to

[20] The tax credit schemes which also sought to aid the nonpublic schools via parents were stricken down on the same basis in *Kosydar* v. *Wolman,* 353 F. Supp. 744 (S.D. Ohio 1973), aff'd *sub nom. Grit* v. *Wolman,* 413 U.S. 901 (1973); and *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973).



individual pupils, such as textbooks. Under the Stipulation (A. 67-71, S. 21 and Ex. D), the pupils can collectively borrow laboratories, maps and globes, posters, gymnastic equipment, encyclopedias, sewing machines and a host of other group-use items.

Second, the statute expressly authorizes the storage of the materials and equipment on the nonpublic school premises. While the lending is to be initiated by "individual request" it is naive to believe that what is requested will not be exclusively determined by the requirements of the nonpublic school administration and faculty.

The net result is that while the pupils or their parents may be the technical bailees of the loaned equipment and materials, these items will be deployed in exactly the same manner as under the prior law under which they were loaned to the schools.[21]

The court below concluded that it was necessary to uphold the First Amendment validity of the provisions for equipment and materials loans because, like the textbook loans upheld in *Meek* and *Allen,* these items were to be loaned "not to the nonpublic schools, but only to nonpublic school children or to their parents." 417 F. Supp. at 1118. The child benefit theory upon which the textbook loan programs were approved requires no such simplistic result.

[21] The Act further authorizes (and it is stipulated that the authority will be exercised, see A. 36, 54-55, S. 22) public personnel, working within the parochial schools, to distribute loan request forms, receive and catalog the requests, maintain inventories, distribute the material and equipment, collect the equipment, maintain custody and storage of the material and equipment, and perform all other duties necessary for the efficient implementation of the program. These provisions alone should suffice to invalidate the programs for excessive entanglement. See *Lemon* v. *Kurtzman,* 403 U.S. 602, 619 (1973).

This Court has only upheld laws which purport to benefit the child, rather than the religious school, where it has found that the "financial benefit of [the] . . . program is to parents and children, not to the nonpublic schools." *Meek* v. *Pittenger,* 421 U.S. 349, 360 (1975). The bus rides approved in *Everson* v. *Board of Education,* 330 U.S. 1 (1947) and the textbooks permitted under *Board of Education* v. *Allen,* 392 U.S. 236 (1968), and *Meek, supra,* were items customarily purchased by the parents. *Meek, supra,* 421 U.S. at 361 n. 10; *Everson, supra,* 330 U.S. at 19-20 (Justice Jackson, dissenting).

Moreover, the busing and textbook programs could in some meaningful way be regarded as conferring a personal benefit upon the child, distinct from the benefit to his class or school as a whole. The child rides the bus; the child carries and reads his textbooks. This Court made special note, in *Board of Education* v. *Allen, supra,* that "the books are furnished for the use of *individual* students. . . . " 392 U.S. at 244 n. 6 (emphasis added). The finding of constitutionality, in *Allen,* rested upon this consideration. *Ibid.* See Freund, *Public Aid to Parochial Schools,* 82 Harv. L. Rev. 1680, 1681 (1969).[22]

This Court has resisted any reductio-ad-absurdum extension of the child-benefit principle which would hold that the state can fund education in church schools because edu-

[22] In *Meek,* as in *Allen* before it, the textbooks were "to be lent *directly* to the student. . . ." *Meek* v. *Pittenger,* 421 U.S. at 361 (1975) (emphasis added). Mr. Justice Black, dissenting in *Board of Education* v. *Allen,* 392 U.S. 236, warned that "[i]t requires no prophet to foresee" that the rationale of *Allen* could be used to support subsidization of total religious education. *Id.* at 253. This Court acknowledged the "wisdom of Mr. Justice Black's prophecy" in *Committee for Public Education* v. *Nyquist.* 413 U.S. 756, 785 (1973).



cation is a benefit to children. The customary recitals of legislative purpose in most, if not all, of the parochial assistance programs recently brought to this Court (and, no doubt, the arguments of their proponents) have emphasized the purpose of benefiting children. However, the answer furnished by this Court, most recently recapitulated in *Roemer* v. *Board of Public Works of Maryland,* 96 S. Ct. 2337 (1976), is that the "State may not . . . pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike." *Id.* at 2345.

As this Court observed in *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), in demarking the boundaries of church-state separation, it was not about "to engage in a legalistic minuet in which precise rules and forms govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance." *Id.* at 614.

The textbook and auxiliary equipment and materials holdings of this Court can be reconciled by a common sense approach to the child benefit theory. It is one thing to view the primary benefit of books furnished to individual children as aid to those individual children, and to regard the benefit to the school as incidental. It is quite another to suggest that wall maps, science labs, globes and the like, which are used by the pupils as a group and which would ordinarily be regarded as classroom equipment and supplies, where loaned under ostensibly similar terms, must receive the same First Amendment treatment. To the contrary, since there is no practical difference between the lending of such

items to the school, which this Court has forbidden to the states, and the lending of such materials to the pupils in care of the school under the scheme of SB 170, the equipment and material loan sections of SB 170 must similarly fall. Such loans are different from the earlier forms of this aid in name only. They constitute direct and primary aid to the schools no less than the benefits under their predecessor programs.[23]

## II.

**Psychological and Speech and Hearing Diagnostic Services Provided by SB 170 Violate the Establishment Clause.**

Sections D, E, and F of the Act provide for various services to be furnished by public personnel "in the [nonpublic] school attended by the pupil receiving the service." Plaintiffs have conceded the facial constitutionality of the "physician, nursing, dental, and optometric services" authorized by Section E, but the "diagnostic psychological services" provided under Section F, and the "speech and hearing diagnostic services" provided under Section D, are wide of the narrow channel[24] through which public aid can flow to sectarian schools.

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[23] While conceivably a few items of equipment might be analogous to textbooks, *i.e.* workbooks or outlines, the law is not limited to these items and the state has obviously taken no steps to "ensure" that proper "restrictions are obeyed" because it has imposed no such restrictions. *Cf. Lemon* v. *Kurtzman,* 403 U.S. 602, 619 (1971). The "potential for impermissible fostering of religion" is thus present. *Ibid.*

[24] See *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 777 (1973).



This Court has said that "public health services" have not been "thought to offend the Establishment Clause." *Lemon* v. *Kurtzman,* 403 U.S. 602, 616-617 (1971). However, the fact that a statutory program of assistance to sectarian institutions has a purpose or effect of promoting health or safety, has not served to sustain it where the program has otherwise had the impermissible effect of aiding religion or excessive entanglement. Thus, for example, in *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973), state grants to maintain and repair nonpublic school buildings so as to "ensure the health, welfare and safety of enrolled pupils" (*Id.* at 763) were ruled invalid. *Id.* at 780. Public psychological and speech and hearing services, though "diagnostic", must also be excluded from sectarian schools.

The Pennsylvania law considered in *Meek* v. *Pittenger, supra,* called for "auxiliary services" to be performed by public employees on parochial school premises. The services included remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services. 421 U.S. at 367. The Pennsylvania public institutions, like those of Ohio (A. 38-39, S. 27), provided no inspection or supervision to establish that the law's secular limits were being observed, because it was felt that such surveillance was unnecessary to assure that a member of the staff had not "succumb[ed] to sectarianization of his or her professional work." 421 U.S. at 368, quoting from the district court opinion, 374 F. Supp. at 657. This Court disagreed.

> " . . . [D]ecisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and coun-

selors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." 421 U.S. at 369.

This Court so ruled in *Meek* on authority of *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), in which it had held that where there is a "potential for impermissible fostering of religion . . . [t]he State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . " *Id.* at 619. "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected . . . " *Ibid.*

Regarding the auxiliary character of the services to be performed by the publicly subsidized teachers in *Meek,* the Court noted:

"That Act 194 authorizes state-funding of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum, does not distinguished this case from *Earley* v. *DiCenso* and *Lemon* v. *Kurtzman, supra. Whether the subject is 'remedial reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists.* The likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but *a diminished probability of impermissible conduct is not sufficient*: 'The State must be *certain,* given the Religion Clauses, that subsidized teachers do not inculcate religion.' 403 U.S., at 619. And a *state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher*



*to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities.*

"The fact that the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related school in which they work, does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. Cf. *Lemon* v. *Kurtzman,* 403 U.S., at 618. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. See *id.,* at 618-619. . . . The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed." (Emphasis added; footnote deleted) 421 U.S. at 370-72; see also *Public Funds for Public Schools* v. *Marburger,* 358 F. Supp. 29 (N.J. Dist. 1973), aff'd 417 U.S. 961 (1974).

The foregoing portion of the *Meek* opinion establishes that the First Amendment strictures against public funding of services to be performed by public employees on parochial premises extend to "counselors" and "remedial"

personnel as well as to teachers. In tacit recognition of this principle, the framers of SB 170 removed the more patently remedial and therapeutic services from the parochial premises to the curbside. And while presumably the most narrowly physical health services such as physician, nursing, dental and optometric are protected by the Supreme Court's dictum approving such services (see *Meek,* 421 U.S. at 371 n. 21), no such protection can be extended to psychological and speech and hearing services.

***Psychological diagnostic services***

The functions of diagnostic psychological personnel include, in addition to aptitude testing, "individual measures to determine social and behavioral adaptability . . . interviewing and . . . projective procedures." A. 39, S. 28 (b) On the face of this description, these functions include a degree of intercommunication between the diagnostician and the pupil, and an intrusion into the social and behavioral aspects of the pupil's personality, which provides at least as great an opportunity for religious influence as does the guidance counseling, testing, and remedial instruction prohibited in the parochial schools by *Meek* and *Marburger, supra,* and by *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973). By virtue of their mutual concerns with human behavior and consciousness, there is a close relationship between aspects of psychology, psychiatry and religion. See, for example, *Thomas S. Szasz, M. D., The Manufacture of Madness* (Harper & Row 1970);[25] see also, *Carl G. Jung, Psychology and Religion* (Yale Univ. Press 1938). Nor is it always possible to separate neatly psychological diagnosis from theory. See *Coleman, Abnormal Psychology and Modern Life,* p. 526-527 (2d ed., Scott, Foresman 1956).

[25] Dr. Szasz expounds the view that institutional psychiatry is an extension of earlier sanctions for heresy as a control for forms of deviation the stigmatization of which is essentially clerical in origin. See particularly *The Manufacture of Madness, supra,* ch. 10 "The Product Conversion—from Heresy to Illness."



The conclusion is compelled that it is excessively entangling for experts employed by the government to tinker with the attitudes and personality of a pupil in the setting of a religious institution. There is too great a danger, for example, that irreverent or heretical attitudes and beliefs will be interpreted as psychologically deviant or antisocial. It is difficult to imagine a situation more potentially destructive of the concept of separation of church and state than that which permits government psychologists to evaluate the mental processes of children in a church.

***Speech and hearing diagnostic services:***

In *Meek* v. *Pittenger* this Court observed, in dictum, that the Pennsylvania Act's "authorization of 'speech and hearing services', at least to the extent such services are diagnostic, seems to fall within that class of general welfare services for children that may be provided by the State. . . ." 421 U.S. at 371 n. 21.[26] Nevertheless appellants urge that Ohio's provision for speech and hearing diagnostic services is vulnerable to challenge on Establishment Clause grounds. The constitutional infirmity of Section D, of SB 170, which authorizes such services, lies in its vague and general wording. "Speech and hearing diagnostic services" are unlimited in character. Nor do

[26] These services were stricken down in *Meek* because they would have been left standing alone, and the Court could not "assume that the Pennsylvania General Assembly would have passed the law solely to provide such aid." 421 U.S. at 371 n. 21.

the guidelines further define the services. A. 56, S. 5 and Ex. B. The stipulated record is that the function of the speech and hearing diagnostic therapist is to "identify children who have speech and hearing handicaps and to refer them to the speech and hearing therapist for treatment." A. 39, S. 28 (a) (i). The diagnostician is to cooperate with the physician and nurse in the development of a hearing testing program. A. 39, S. 28 (a) (ii). However, the diagnostician's services are not limited to employing any standardized or objective testing methods.

In drawing the line between general welfare provisions and impermissible remedial education measures prohibited by *Meek* and *Marburger* it would appear necessary to consider the opportunity for sectarian influence and abuse. See *Meek,* 421 U.S. at 371-72. Where the "potential for impermissible fostering of religion . . . although somewhat reduced, is nonetheless present," this Court has held that unconstitutional continuing surveillance would be necessary to enforce restrictions. *Meek* v. *Pittenger,* 421 U.S. 349, 372 (1975).

Unlike a physician or a nurse whose contact with the child is ordinarily limited to a physical appraisal and a minimal amount of oral communication concerning the child's physical condition, the speech and hearing staff can be expected to communicate with a pupil at length in order to assess the child's communicative abilities. Without inspection, controls, or even regulatory requirements concerning the methods of diagnosis, the danger that a speech and hearing diagnosis program could involve unrestricted conversation between therapist and pupil in which the therapist, like the "chemistry teacher" whose vulnerability was noted in *Meek* (*Id.* at 371), would "fail



on occasion to separate religious instruction and the advancement of religious beliefs from his secular . . . responsibilities" (*Ibid.*), cannot be ignored.

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The Court below, without reference to authority, upheld these diagnostic programs in the belief that they require "only relatively limited contact with the child" (417 F. Supp. at 1121) and that the notion that health services "must be conducted in silence . . . strikes this Court as beyond the reach of reason." *Ibid.* However, this Act does not guarantee that the contacts will be minimal, or that when the silence is broken, the utterances will be secular. Just as the State could not rely on the "good faith and professionalism of the secular teachers and counselors functioning in church related schools . . . " *Meek, supra,* 421 U.S. at 369, it is insufficient to rely on the good faith and professionalism of other personnel, at least when their duties are permitted to involve substantial communication with pupils.

The opportunity for sectarian content is present and the State has taken no steps to be "certain . . . that the subsidized" personnel "do not inculcate religion . . . " *Lemon* v. *Kurtzman,* 403 U.S. 602, 618-619 (1971). Therefore the diagnostic provisions of SB 170 must be declared invalid.

## III.

**Therapeutic Psychological and Speech and Hearing Services, Guidance and Counseling Services, Remedial Services and Services for the Handicapped Provided by SB 170 Violate the Establishment Clause Except to the Extent Furnished Within Public Schools.**

The therapeutic, counseling and remedial services encompassed by Sections G, H, I and K of the Act plainly extend far beyond the neutral health services approved by dictum in prior decisions of this Court.

The services authorized by these sections include "therapeutic psychological and speech and hearing services" (G), "guidance and counseling services" (H), "remedial services" (I) and "programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped. . . . " (K). The guidelines do not appreciably narrow the available services (A. 56-58, S. 5 and Ex. B).

The stipulation, however, makes it clear that therapeutic personnel are to have ample educational and counseling duties involving close and ongoing relationships with pupils.

For example, the functions of the school psychologist include parent and teacher conferences, report writing and planning, and "intervention strategies." A. 43-44, S. 36 (a). Similarly, guidance counselors, *inter alia,* lend assistance in developing self-understanding and developing educational and career goals. A. 45-47, S. 36 (c). The learning disability staff implements instructional plans (A. 47, S. 36 (d)), and the remedial services staff supplements classroom instruction for children with problems and disabilities. A. 47-48, 36 (e).[27]



The authorized services are thus similar to those which, *Meek* and *Marburger* instruct, have too great a potential for religious infusion to be performed by public personnel within parochial schools. In *Meek,* "remedial and accelerated instruction" and "guidance counseling" were offered. 421 U.S. at 367. In *Marburger,* remedial and corrective instruction and guidance counseling, *inter alia,* were involved. 358 F. Supp. 29, 39 (N.J. Dist. 1973), aff'd 417 U.S. 961 (1974). Because this Court has held, in *Meek* and *Marburger,* that such programs cannot be conducted by state personnel in sectarian schools, the Establishment Clause propriety of the SB 170 programs must stand or fall on the constitutional effect of diverting them from within the school to a public school, or to a public center or mobile unit stationed off the nonpublic premises.

While the furnishing of governmentally subsidized services to pupils enrolled in a public school on the same basis as such services are provided for public school pupils in that school presents grave problems of excessive entanglement in the scheduling and integration of such services, it would appear that a statute authorizing parochial pupils to enter a public school and receive such services, as a part of a program offered to public school pupils as well, is

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[27] The remedial services and services for the handicapped are not defined by the Act or the stipulation in any manner which limits the services to health programs. Indeed the record establishes that the programs are to be instructional. A. 47-48, S. 36 (d) and (e). However much one may sympathize with a handicapped child, it is no more proper to subsidize his education in a religious school than to subsidize such parochial education for a normal child.

not facially invalid.[28] Accordingly, plaintiffs do not challenge the provision for furnishing such services in the public schools.[29] However, the furnishing of such services in other public centers or in mobile units presents different First Amendment problems. Insofar as SB 170 permits these programs it fosters aid to religious activity.[30]

**A. *The use of mobile units results in the perpetuation of the evils presented by on-premises auxiliary services.***

It is stipulated that where mobile units are employed they will "in all probability be stationed on public property close to the nonpublic school of attendance" (A. 42-43, S. 33); and that "[w]hile so stationed, the personnel in the unit will be providing services solely to nonpublic school pupils except in unusual circumstances. . . ." *Ibid.* In other words, a publicly purchased mobile home can be parked in a lot next to the parochial school, or at its curbside, and public personnel will operate it as an annex

[28] This Court declined to rule on the First Amendment consequence of the obverse situation where public school teachers would enter parochial schools to perform remedial services funded under Title I of the Federal Elementary and Secondary Education Act of 1965 (20 U.S.C. 241 (a) *et seq.*) in *Wheeler* v. *Barrera*, 412 U.S. 402 (1974). In view of the opinion in *Meek* v. *Pittenger*, such use of Title I funds may well be invalid. However, the dual enrollment programs noted as an alternative in *Wheeler* (417 U.S. at 409-410) have not yet been adjudicated by this Court.

[29] Plaintiffs reserve the right to attack the application of this portion of the statute if a different program is administered for parochial pupils within a public school, or if excessive entanglement appears.

[30] Since safeguards against advancement of religion are not provided, it is unnecessary to determine whether such safeguards would create excessive entanglement as found in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).



to the parochial school to provide services which could not be performed within the walls of the school itself. In fact, the services could even be provided on grounds presently devoted to sectarian use if a parking area is transferred from the church to the school district or other political subdivision. In other words, the only difference between these services performed in mobile units under SB 170, and the services unconstitutionally furnished under the former Ohio law or the Pennsylvania and Michigan laws previously stricken down, is the technical difference of title to the classroom.

As noted earlier (p. 31) this Court has cautioned that parochial aid schemes are not to be evaluated in "a legalistic minuet in which precise rules and forms must govern." *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971). Rather, "the form of the relationship" must be examined "for the light it casts on the substance." *Ibid.*

The reason for this Court's conclusion that the Pennsylvania auxiliary services program constituted impermissible direct aid was not that the public lacked title to the real estate where the services were to be rendered, but that the public employees were performing services where "education is an integral part of dominant sectarian mission . . . ," *Meek* v. *Pittenger*, 421 U.S. 349, 371 (1975), so that the "potential for impermissible fostering of religion . . . , although somewhat reduced, is nonetheless present." *Id.* at 372. It is difficult to discern why a special satellite facility for parochial pupils, parked outside the gate but devoted entirely to the nonpublic institution to which it is appended, should provide materially less opportunity for fostering of religion than the same unit inside the walls. It is true that religious artifacts may be absent

from the mobile unit's walls; but that is about the only discernible difference. If, for example, a guidance counselor performs his counseling in a mobile office parked at the gates of a sectarian institution, it would appear no less likely that the counselor will give deference to the sectarian attitudes of the institution on matters such as sexual morality, birth control, abortion, intermarriage and the like as if the counselor were within the walls of the institution.

Where auxiliary services are performed within a public school as part of a generally available program there would appear to be much less potential for pressure from the sectarian beneficiaries of the program for concessions along doctrinal lines than where the program is directed toward a particular sectarian constituency. Moreover, where the program is administered in a public school as part of its regular program it may be possible to regard the extension of the program to parochial pupils as a matter of making "available to all children the benefits of a general program." *Meek* v. *Pittenger*, 421 U.S. 349, 360 (1975) quoting from *Board of Education* v. *Allen*, 392 U.S. 236, 243-44 (1968).[31] On the other hand, where elaborate differences are built into the program as it is administered for parochial pupils, it must be regarded as a special program for a limited class of sectarian beneficiaries, and constitutionally suspect on that ground alone. See *Wolman* v. *Essex*, 342 F. Supp. 366, 412 (S.D. Ohio 1972), aff'd 409

[31] This position is consistent with the thesis of Freund, *Public Aid to Parochial School*, 82 Harv. L. Rev. 1680 (1969), in which the view is expressed that "[s]hared time instruction in the public schools, treating participating parochial school children as part-time public school children" (*Id.* at 1691) is the limit to which the policy of neutrality [toward religion] carries us." *Id.* at 1688.



S. Ct. 808 (1972); *Kosydar* v. *Wolman*, 353 F. Supp. 744, 752-53 (S.D. Ohio 1972), aff'd 93 S. Ct. 3062 (1973); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 783 n. 38."[32]

In *Nyquist*, this Court refused to analogize tuition grants, available only to the nonpublic class of beneficiaries, to textbooks and bus rides as an "endeavor to provide comparable benefits to parents of schoolchildren whether enrolled in public or nonpublic schools," 413 U.S. at 782. The same reasoning requires conclusion that the mobile units serve to benefit a sectarian group. The fact that comparable programs may be available in public schools does not cure this infirmity.

**B. *The furnishing of services in public centers constitutes a special benefit to a sectarian class without essential guarantees against fostering religion or excessive entanglement.***

The third category of facility where therapeutic and remedial services may be furnished under SB 170 is "public centers." Neither the Act nor the guidelines specify the kinds of public centers which may be employed for such purposes, but the stipulation denotes the intention of the Ohio Department of Education that such facilities as " . . . a library, public meeting hall, firehouse, or recreation center . . . " may be so employed. A. 42-43, S. 33. That stipulation also establishes that "[i]f a program is to be offered at a public center such as . . . [those listed above], services *may* be available for public and nonpublic pupils at the same center." *Ibid.* (Emphasis added.) Since Ohio

[32] The district court in *Marburger* invalidated textbook purchase reimbursements for parents of parochial pupils on this basis. 358 F. Supp. 29, 36 (N.J. Dist. 1973) aff'd 417 U.S. 961 (1974).

law does not provide for such services to be rendered for public school students at facilities such as those listed above, it is highly speculative that such services will in fact be rendered to public school students at public centers. As indicated in the stipulation quoted above, the furnishing of such services at public centers to pupils across the board "may" occur, or optionally, the public centers may be exclusively devoted to assisting the sectarian community insofar as the services contemplated by the Act are concerned.

Plaintiffs have no quarrel with making public centers available to pupils enrolled in nonpublic schools *for the same purposes for which those facilities are available to the public.* For example, it would be unthinkable to deny some pupils access to libraries, museums, parks, zoos, and the like because they are enrolled in parochial schools. However, that is not the case when a special program is instituted in a public center for the special benefit of parochial pupils, and that program is either not available to public school pupils at that center, or is only made available to them in order to justify the assistance to the parochial constituency. In either case, the public benefit must be regarded as incidental, and the primary purpose and effect must be deemed to constitute assistance to a sectarian class of beneficiary.

Moreover, the Act does not identify the public centers at which the services are to be rendered, and the listing in the stipulation (A. 42-43, S. 33) is not recited to be exclusive. There is nothing in the Act to preclude a substantial portion of the massive appropriation from being expended on the capital cost of erecting centers which are public in the sense of belonging to the school district,



but which are brought into being solely to effectuate the provisions of the Act for the benefit of nonpublic school pupils. Appellees have urged that there is no official intention to do so (Motion of nonpublic appellees to Dismiss or Affirm, p. 14), but the Act does not restrict the funds against such use.

This Court has recognized that the three-part test applied in recent Establishment Clause cases—secularity of purpose, a primary effect that neither advances nor inhibits religion, and avoidance of excessive entanglement—is not exclusive.

> "It is well to emphasize . . . that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek* v. *Pittenger,* 421 U.S. 349, 358-59 (1975).

Even if religion *per se* were not advanced and excessive entanglement were avoided, the Establishment Clause would appear to be violated by the government's furnishing of even secular benefits to a distinctly sectarian class. For example, the furnishing of free toothbrushes—as well as free Bibles—only to Christians or only to Jews would be inconsistent with the Establishment Clause injunction against an officially preferred church. James Madison, in his Remonstrance, which is perhaps the seminal precursor of the religion clauses[33] hinted at this proposition when he suggested that the Virginia bill to support teachers of the Christian religion "violates equality by subjecting

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[33] See *Everson* v. *Board of Education,* 330 U.S. 1, 12 (1947).

some to peculiar burdens; so it violates the same principle by granting to others peculiar exemptions." [34]

Moreover, even though the services may be provided at a nonsectarian site, under SB 170 they will be provided to an identifiable sectarian group. The same problems of sectarian influence as are created by the use of curbside mobile units are thus presented. See pp. 43-45, *supra*. While the publicly paid teachers, counselors and therapists may not be within the walls of church property, they will nevertheless be subject to pressures to tailor their approach to the sectarian requirements of the constituency in the name of good relations. A guidance counselor or psychologist may well be intimidated in his approach to a teenager's sexual or familial difficulties by the fact that the counseling is in the environment of a group possessed of a clear orthodox religious dogma on the subject. The state has taken no steps to assure that this religious infusion will not take place and that the "subsidized teachers do not inculcate religion. . . ." *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971). Like the auxiliary personnel in *Meek* v. *Pittenger*, Ohio's remedial and counseling staff is engaged in "performing important educational services" [35] which, if not within the nonpublic schools, will nevertheless be directed to their sectarian student bodies. The "atmosphere" will remain "dedicated to the advancement of religious belief. . . ." *Meek* v. *Pittenger*, 421 U.S. 349, 371 (1975).[36]

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[34] James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 4, reproduced at 330 U.S. 64, 66.

[35] *Meek, supra*, 421 U.S. at 371.

[36] The Court below noted that "according to the stipulations of the parties, it is anticipated that personnel providing therapeutic and remedial services will, under some circumstances, be required to deal with the child's regular classroom teachers." 417 F. Supp. at 1123.



Given the stipulated fact that distance and safety of travel will be factors in site selection for these services (A. 42, S. 32) clairvoyance is not required to foresee that public centers, like mobile units, will generally be located as close to the parochial schools as possible. To the extent that these services are not provided in facilities fully shared and integrated with the public school student bodies, they clearly threaten a proliferation of public annexes to church schools. Such a prospect cannot be squared with the commands of the Establishment Clause.[37]

## IV.

## Standardized Testing and Scoring Services Provided by SB 170 Violate the Establishment Clause.

In *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973), this Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for expenses of examination and testing of pupils. The basis for the rejection of this program was not merely that it involved the payment of money to the nonpublic schools, but that testing is an "integral part of the teaching process." 413 U.S. at 481 quoting with approval from the holding of the district court, 342 F. Supp. at 444.

It is true that most of the testing involved in *Levitt* was teacher prepared, whereas the tests authorized by Section J of SB 170 are "standardized." However, the thrust of *Meek* v. *Pittenger* is that given the pervasive religious mission and character of the parochial school, "it would

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[37] Transportation to and from public centers, authorized by these provisions of SB 170 also constitutes a special benefit to a sectarian class and should be invalidated on that basis.

simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed. . . ." *Id.* at 365.[38]

Testing, even when standardized, remains an "integral part of the teaching process," *Levitt, supra* (413 U.S. at 481). As such, testing is not a denominationally neutral health service; nor is it an item which can be "loaned" to individual children in the parochial and public schools like a textbook. It involves personnel of the state in scoring to "measure the progress of students" in their subjects at the parochial schools (A. 48, S. 37). Considering the factor of pervasive religious infusion found by the Supreme Court in *Meek,* that the subjects scored are nominally secular can make no difference. The predominantly sectarian teaching mission of the parochial school is a primary and direct beneficiary. The Establishment Clause is thereby violated.

[38] The subsequent New York scheme for reimbursing parochial schools for the cost of administering state-prepared examinations has thus been invalidated on authority of *Meek*. *Committee for Public Education* v. *Levitt,* 414 F. Supp. 1174, 45 L.W. 2021-22 S.D.N.Y. June 21, 1976). Appeal to this Court was filed October 19, 1976, has been assigned No. 76-595, and is pending.



## V.

### Field Trip Transportation Authorized by SB 170 Violates the Establishment Clause.

Bus transportation to and from parochial schools, approved in *Everson* v. *Board of Education,* 330 U.S. 1 (1947), was thought to approach "the verge." *Id.* at 16. See *Lemon* v. *Kurtzman,* 403 U.S. 602, 624 (1971). At most, the transportation approved in *Everson* involved getting the child to and from school at regular morning and afternoon times. That transportation did not involve assistance to any specific portion of the educational program of the parochial school; and the scheduling entanglements which it entailed, though certainly substantial, were relatively predictable and manageable. This Court noted, in *Everson,* that the services which it approved for parochial schools were " . . . separate and . . . indisputably marked off from the religious function. . . ." 330 U.S. at 18. In view of the impossibility, for Establishment Clause purposes, of any "attempt to separate secular educational functions from the predominantly religious role" of these schools, *Meek* v. *Pittenger,* 421 U.S. 349, 365 (1975), busing which is an integral part of the education process, like testing, must constitute impermissible aid to the sectarian function of the institution.

Field trip transportation provided under Section L of the Act is stipulated to be for the purpose of facilitating trips "to enrich the secular studies of students." (A. 49, S. 38). As such it bears a direct relation to the educational program of the school, including its integrated religious program, which the state is not permitted to enhance. See *Meek, supra,* 413 U.S. at 366.

Moreover, the opportunities and necessity for excessive entanglement are greatly exacerbated in the case of field trip transportation. The busing needs for an *Everson*-type commuter program can be anticipated based on nonpublic enrollment for the school year, and presumably will not change drastically from day-to-day within a school year. On the other hand the extent of required field trip transportation depends not only upon enrollment, but also upon the unilateral determination of the nonpublic school administration as to the number and destination of field trips. Accordingly, it will be necessary for the public and nonpublic school administrations to cooperate in the allocation and scheduling of busing in connection with field trips. In the event of conflict, it can be anticipated that pressure from the sectarian community will be exerted to obtain concessions from the government operated schools. The prospect of administrative and political entanglement is therefore present.[39]

If the busing approved in *Everson* "was thought to approach the 'verge'" (*Lemon*, 403 U.S. at 624), the field trip transportation contemplated by SB 170 must be deemed to have stepped beyond the precipice.

[39] The Court below minimized the importance of the entanglement factor by referring to the Act's provision for contracting the transportation services. 417 F. Supp. at 1125. However, contracting merely changes the context of the entanglement, for if a nonpublic school can, in effect, cause the school district to hire a bus whenever it desires one, budgetary chaos would result. There will remain the necessity of coordination and competition for available busing funds.



## VI.

**The Textbook Loan Provisions of SB 170 Violate the Establishment Clause.**

There are significant distinctions between the textbook loans provisions of Section A of SB 170 and those upheld by this Court against challenge under the religion clauses of the First Amendment in *Board of Education* v. *Allen*, 392 U.S. 236 (1968) and *Meek* v. *Pittenger, supra.* Most notably, the definition of "textbook" is broadened to include "any book or book substitute which a pupil uses as a text or text substitute. . . ." Given the position of the appellees[40] that there is no realistic difference between books and auxiliary equipment and materials, the concept of book substitutes may well come to be employed to permit the public furnishing of items which cannot be loaned under the doctrine of *Meek* v. *Pittenger, supra.*

While it is stipulated that if called to testify, Ohio Department of Education officials would aver[41] that "[t]extbooks, including book substitutes, provided under this Act shall be limited to books, reusable workbooks, or manuals, whether bound or in looseleaf form. . . ." (A. 35-36, S. 20) it is also stipulated that

> "the stipulation can only go to the intent and policies of the Department of Education rather than to the precise manner in which that intent of policy will or will not be carried out in all instances." A. 49, S. 39.

[40] Sustained by the court below. 417 F. Supp. at 1119.

[41] A. 25, S. p. 1, introductory paragraph.

The mere intent of the Department of Education is not a sufficient safeguard against Establishment Clause abuse, and is not the equivalent of a statutory restriction which can be predicted to remain in effect unless amended by the legislature with all of the publicity inherent in the legislative process.

As has been noted in preceding sections of this brief (for example, pp. 33-35, *supra*) the decisions of this Court have required that the states "ensure" against sectarian abuse of parochial assistance programs. See *Meek* v. *Pittenger,* 421 U.S. 349, 372 (1975); *Lemon* v. *Kurtzman,* 403 U.S. 602, 619 (1971). SB 170 only ensures that the textbook loan clause will not be abused so long as the Superintendent of Public Instruction does not change his mind.

The Ohio book loan provisions can thus be held to constitute impermissible aid to religion without disturbing prior decisions of this Court. However, even if the Ohio provisions were identical to those involved in *Meek* and *Allen,* appellants respectfully urge that they should be stricken down, and that insofar as previous rulings of this Court have upheld such programs, those decisions should be overruled.

It is possible and appropriate to harmonize the textbook and auxiliary equipment facets of this Court's opinion in *Meek* without exalting form over substance along the lines suggested in Section I of this Argument (pp. 19-32, *supra*). Nevertheless, the dissenting opinions of Justices Black and Douglas in *Allen* (392 U.S. at 250 and 254) and the partial dissent of Justice Brennan in *Meek,* in which Justices Douglas and Marshall joined, have great force. For as Justice Douglas said, in *Allen,* "[t]he textbook goes to the very heart of education in a parochial school." 392 U.S. at 257.



And as Justice Brennan observed in *Meek,* it was "crystal clear that the nonpublic school and not its pupils . . . [was] the motivating force behind the textbook loan. . . ." 421 U.S. at 379-80.

This Court has not shrunk, where necessary, from overturning its previous decisions which have been out of line with the theme of intervening constitutional developments. Appellants urge this Court now to hold that textbook loans, like other forms of state aid to integral parts of the parochial teaching process[42] from which the "predominant religious role" cannot be extracted,[43] cannot be supplied in aid of sectarian institutions by the State.

## VII.

**The Programs Authorized by SB 170 Foster Excessive Political Entanglement.**

In *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971) this Court took heed of the "broader base of entanglement"[44] engendered by the "devisive political potential"[45] of state parochial aid programs.

> "The potential for political divisiveness related to religious belief and practice is aggravated . . . by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." *Id.* at 623.

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[42] Cf. *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973).

[43] See *Meek,* 421 U.S. 349, 365 (1975).

[44] 403 U.S. at 622.

[45] *Ibid.*

In *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973), it was suggested that although

> "the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored." *Id.* at 798-99, quoting from *Lemon* v. *Kurtzman, supra,* 403 U.S. at 625.

Most recently, in *Meek* v. *Pittenger,* this Court has reaffirmed the importance of considerations of political entanglement. "The Act . . . provides successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect. . . ." 421 U.S. at 372.

The political entanglement fostered by Ohio's latest enactment is particularly pernicious. In the first place, the amount of the appropriation is enormous. The eighty-eight million dollars appropriated for the current biennium (A. 27, S. 6) is substantially larger than the Pennsylvania appropriation in *Meek* which this Court characterized as "massive." 421 U.S. at 365.[46] Based upon an Ohio nonpublic enrollment of 262,628 (A. 28, S. 10), the *average* annual expenditure per pupil exceeds $167, as contrasted with the grants of $75 to $150 involved in *Sloan* v. *Lemon,* 413 U.S. 825, 831 (1973), or the "modest" grants of $50 to $100 considered in *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 797 (1973). The "self-expanding

[46] In *Meek,* the 1973-74 appropriation under Act 195 (equipment, materials and textbooks) was $17,560,000 and the appropriation for services for that year was $17,880,000. 421 U.S. at 365 n. 15; *id.* at 369 n. 19. The annual appropriation in Ohio exceeds $44,000,000.



propensities" of these laws, noted in *Lemon* v. *Kurtzman,* 403 U.S. 602, 624 (1971), are strikingly demonstrated when the SB 170 appropriation is compared to the mere $5,000,000 expended per year under the Pennsylvania program invalidated in that case. *Id.* at 610.[47]

Auxiliary materials, equipment and services for the parochial schools are thus supplied at an annual cost which is greater than that which was deemed appropriate, only a few years ago, for public aid to the core of the secular education programs of the parochial schools.

This "potential for political entanglement"[48] infects all but the most neutral, health-oriented programs countenanced by the Act. When considered together with the Act's primary effect of advancing religion, and the necessity for surveillance to prevent excessive entanglement under its programs, this political entanglement requires that SB 170 be ruled invalid.

[47] In Ohio, aid to parochial schools was funded at only about $30,000,000 per year under the tuition reimbursement program stricken down in *Wolman* v. *Essex,* 342 F. Supp. 399 (S.D. Ohio 1974), aff'd 409 U.S. 808 (1972).

[48] *Meek* v. *Pittenger,* 421 U.S. 349, 372 (1975).

## CONCLUSION

SB 170 is an elaborate effort to evade the commands of *Meek* v. *Pittenger*, 421 U.S. 349 (1975). The remark of Mr. Justice Brennan, partially dissenting in that case, is relevant. "[I]t should be observed that sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones." *Id.* at 381. Except insofar as it provides narrowly defined health services, this law must be declared invalid.

• • • • •

For the foregoing reasons, appellants respectfully urge this Court to reverse the decision of the District Court.

Respectfully submitted,

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# APPENDIX

## APPENDIX

## OHIO REVISED CODE

**Section 3317.06 (SB 170):**

Moneys paid to school districts under division (P) of section 3317.024 [3317.02.4] of the Revised Code shall be used for the following independent and fully severable purposes:

(A) To purchase such secular textbooks as have been approved by the superintendent of public instruction for use in public schools in the state and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents. Such loans shall be based upon individual requests submitted by such nonpublic school pupils or parents. Such requests shall be submitted to the local public school district in which the nonpublic school is located. Such individual requests for the loan of textbooks shall, for administrative convenience, be submitted by the nonpublic school pupil or his parent to the nonpublic school which shall prepare and submit collective summaries of the individual requests to the local public school district. As used in this section, "textbook" means any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends.

(B) To purchase and to loan to pupils attending nonpublic schools within the district or to their parents upon individual request, such secular, neutral and nonideological instructional materials as are in use in the public schools within the district and which are incapa-

ble of diversion to religious use and to hire clerical personnel to administer such lending program.

(C) To purchase and to loan to pupils attending nonpublic schools within the district or to their parents, upon individual request, such secular, neutral and nonideological instructional equipment as is in use in the public school within the district and which is incapable of diversion to religious use and to hire clerical personnel to administer such lending program.

(D) To provide speech and hearing diagnostic services to pupils attending nonpublic schools within the district. Such service shall be provided in the nonpublic school attended by the pupil receiving the service.

(E) To provide physician, nursing, dental, and optometric services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the nonpublic school pupil receiving the service.

(F) To provide diagnostic psychological services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the pupil receiving the service.

(G) To provide therapeutic psychological and speech and hearing services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall



be provided by the public school district in which the nonpublic school is located.

(H) To provide guidance and counseling services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(I) To provide remedial services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(J) To supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state.

(K) To provide programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the

public school, or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(L) To provide such field trip transportation and services to nonpublic school students as are provided to public school students in the district. School districts may contract with commercial transportation companies for such transportation service if school district busses are unavailable.

Health services provided pursuant to divisions (D), (E), (F), and (G) of this section may be provided under contract with the state department of public health.

Transportation of pupils provided pursuant to divisions (G), (H), (I), and (K) of this section shall be provided by the public school district from its general funds and not from moneys paid to it under division (P) of section 3317.024 [3317.02.4] of the Revised Code.

The duties of clerical personnel, hired pursuant to divisions (B) and (C) of this section, shall include distribution of loan request forms, receipt and cataloging of loan requests, inventory of instructional materials and instructional equipment, distribution of instructional materials and instructional equipment to pupils or their parents, retrieval of such instructional materials and instructional equipment, and maintaining custody and storage of these items. The instructional material and instructional equipment authorized to be loaned pursuant to divisions (B) and (C) of this section may be stored on the premises of the nonpublic school of attendance and the clerical personnel hired for administration of the lending program may perform their



services upon the premises of the nonpublic school when in the determination of the state department of education, it is necessary and appropriate for efficient implementation of the lending program.

No school district shall provide health or remedial services to nonpublic school pupils as authorized by this section unless such services are available to pupils attending the public schools within the district.

Health and remedial services and instructional materials and equipment provided for the benefit of nonpublic school pupils pursuant to this section and the admission of pupils to such nonpublic schools shall be provided without distinction as to race, creed, color, or national origin of such pupils or of their teachers. No instructional materials or instructional equipment shall be loaned to pupils in nonpublic schools or their parents unless similar instructional materials or instructional equipment are available for pupils in the public schools of the school district.

No school district shall provide services, materials, or equipment for use in religious courses, devotional exercises, religious training, or any other religious activity.

As used in this section, "parent" includes a person standing in loco parentis to a child.

Notwithstanding section 3317.01 of the Revised Code, payments shall be made under this section to any city, local, or exempted village school district within which is located one or more nonpublic elementary or high schools.

The allocation of payments for textbooks, instructional materials, instructional equipment, health ser-

vices, and remedial services to city, local, and exempted village school districts shall be on the basis of the state board of education's estimated annual average daily membership in nonpublic elementary and high schools located in the district.

Payments made to city, local, and exempted village school districts under this section shall be equal to specific appropriations made for the purpose.

The state department of education may adopt guidelines and procedures under which such programs and services shall be provided and under which districts shall be reimbursed for administrative costs incurred in providing such programs and services.

Funds distributed pursuant to this section shall not exceed specific appropriations made therefor by the general assembly, unless expressly approved by the emergency board or the controlling board.



**Former Section 3317.062 (repealed):**

Moneys paid to school districts under division (D) of section 3317.02 of the Revised Code shall be used to provide . . . services and materials to pupils attending nonpublic schools within the school district for: guidance, testing, and counseling programs; programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children; audio-visual aids; speech and hearing services; remedial reading programs; educational television services; programs for the improvement of the educational and cultural status of disadvantaged pupils. . . .

• • • • •

Services, instructional materials, or programs provided pursuant to this division for pupils attending nonpublic schools shall not exceed in cost or quality such services, instructional materials, and programs as provided for pupils in the public schools of the district.

No school district shall provide services, materials, or programs for use in sectarian religious courses or devotional exercises. No educational materials provided shall be used in, especially suitable for use in, or selected for use in sectarian religious courses or devotional exercises.

Educational services, materials, and programs provided for the benefit of nonpublic school pupils under this division and the admission of pupils to such nonpublic schools shall be provided without distinction as to the race creed, color, or national origin of such pupils or of their teachers. No services, materials, or programs shall be provided for pupils in nonpublic schools unless such services, materials, or programs

are available for pupils in the public schools of the school district.

The state department of education shall adopt guidelines and procedures under which such programs and services shall be provided and under which districts shall be reimbursed for administrative costs incurred in providing such grants, services, and materials.

Funds distributed pursuant to this section shall not exceed specific appropriations made therefor by the general assembly, unless expressly approved by the emergency board or the controlling board.



**Section 3317.024:**

To school districts meeting the requirements of section 3317.01 of the Revised Code, in addition to the moneys paid to eligible school districts pursuant to section 3317.022 [3317.02.2] or 3317.11 of the Revised Code, there shall be distributed monthly, quarterly, or annually as may be determined by the state board of education, moneys appropriated for the following education programs:

• • • • •

(P) An amount to each school district, for each pupil attending a chartered nonpublic elementary or high school within the district. The amount shall equal the amount appropriated for the implementation of section 3317.06 of the Revised Code divided by the average daily membership in grades one to twelve in nonpublic elementary and high schools within the state as determined during the first full week in October of each school year.

# In the Supreme Court of the United States

OCTOBER TERM, 1976

Case No. 76-496

BENSON A. WOLMAN, ET AL.,
*Plaintiffs-Appellants,*

v.

MARTIN W. ESSEX, ET AL.,
*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

## BRIEF OF THE STATE DEFENDANTS-APPELLEES

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1. Does a state statute which makes available to all school children, those in non-public as well as public schools, the benefits of a general program to lend textbooks free of charge violate the Establishment Clause?

2. Does a state statute which makes available to all school children, those in non-public as well as public schools, secular instructional materials and equipment which are incapable of diversion to sectarian use violate the Establishment Clause?

3. Does a state statute which provides for diagnostic services to all school children, those in non-public as well as public schools, violate the Establishment Clause?

4. Does a state statute which provides for therapeutic and remedial services in public schools, public centers or mobile units for all children in the state who require special assistance in order to proceed at the same educational level as their more fortunate classmates, violate the Establishment Clause?

5. Does a state statute which provides for standardized tests and scoring services in order to measure the progress of non-public school students in secular subjects violate the Establishment Clause?

6. Does a state statute which provides transportation for field trips to all school children, those in non-public as well as public schools, violate the Establishment Clause?

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---

## BRIEF OF THE STATE DEFENDANTS-APPELLEES

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## STATEMENT OF THE CASE

This action was instituted by several citizens and taxpayers of the State of Ohio to challenge the validity of Section 3317.06 of the Ohio Revised Code. They contend that the statute constitutes a law respecting an establishment of religion which is prohibited by the Establishment Clause of the First Amendment.

Section 3317.06, *supra*, provides certain specified forms of assistance to students in non-public schools. The statute is set forth in the appendix to the Brief for Appellants.

The statute authorizes the expenditure of monies by local school districts to purchase secular textbooks which have been approved for use in the public schools and loan them to students attending non-public schools; purchase secular, neutral and non-ideological instructional materials and equipment which are used in the public schools and loan them to students attending non-public schools; provide certain specified diagnostic and health services to students attending non-public schools; provide certain specified auxiliary and remedial services to students attending non-public schools; supply standardized tests used in the public schools for the use of students attending non-public schools; and provide field trip transportation for students attending non-public schools.

The statute specifically provides that each of its provisions is independent and fully severable. See also: Section 1.50 of the Ohio Revised Code.

The statute limits the materials and services available to those which are available to students attending public schools in the district; provides that the students, in order to be eligible to receive the materials or services, attend schools where admission and hiring policies make no distinction as to race, creed, color or national origin; and prohibits the provision of materials or equipment which are capable of diversion to religious use.

Section 3317.06, *supra*, was enacted, and the statute which previously provided assistance to students in non-public schools was repealed by the Ohio General Assembly, following *Meek* v. *Pittenger*, 421 U.S. 349 (1975), to eliminate those forms of assistance which this Court found constitutionally objectionable in that case.



The State of Ohio has included non-public school students, along with those in public schools, as beneficiaries of certain instructional materials and health and auxiliary services since 1967. The original statute was found constitutional by the Supreme Court of Ohio in *P.O.A.U.* v. *Essex*, 28 Ohio St. 2d 79 (1971).

The statute providing this assistance for non-public school students was again challenged and found valid in *Wolman* v. *Essex*, Case No. 72-292. The judgment in that case was vacated by this Court and remanded for further consideration in light of the decision in *Meek*. *Wolman* v. *Essex*, 421 U.S. 982 (1975).

Following the remand the District Court by consent order found that statute unconstitutional. The consent order recites that counsel for the defendants did not attempt to distinguish the *Meek case* since the statute involved in that case had already been repealed.

The parties have stipulated that over 250,000 students were educated in non-public schools in Ohio during the 1974-1975 academic year. Approximately 96 percent of these non-public schools are denominational and approximately 86 percent are Catholic. (Stip. 10, App. 28-29).

The parties have also stipulated that the Catholic schools in Columbus, Ohio are fairly representative of Catholic schools throughout the state and that officials of the Columbus Catholic schools, if called upon to testify, would state that the following facts are true concerning their schools. (Stip. 13, App. 30.)

The schools teach the secular subjects required to meet the state minimum standards during the five-hour school day required by such standards. During the classes in which these subjects are taught, the content is generally equivalent to that taught in such classes in the public schools.

The schools have added another half hour to their school day. This added half hour is usually devoted to religious instruction. Discussion of topics upon which the Catholic Church has taken a position are programmed to take place only in the religion classes. If the school schedules a religious function, it is held either during the religion class or after school. (Stip. 13g, App. 31.)

Teachers employed in such schools include members of almost every religious faith and sect. In all probability, however, a majority of the teachers are members of the Catholic Church. (Stip. 13j, App. 33.) Less than one-third of the teachers are members of a religious order. Most members of a religious order have discontinued wearing a distinctive habit while teaching.

Members of some religious orders have taken a vow of obedience. This vow does not require obedience to the Church with reference to what a person teaches in school or how he teaches it. The vow is not concerned with such matters. (Stip. 13d, App. 30.) No teacher is instructed to teach religious doctrine in a secular course or to integrate religious doctrine into such courses. (Stip. 13m, App. 33.)

On July 21, 1976, the three-judge District Court rendered its judgment and opinion upholding the validity of the statute and dismissing the action.

## SUMMARY OF ARGUMENT

The State of Ohio has determined that it is in the public interest to improve the quality of education for all children in the state and to provide those children who have educational handicaps the special assistance which they need to proceed at the same educational level as their more fortunate classmates. The General Assembly of Ohio, therefore, adopted legislation in 1967 to provide certain health and special educational services to all children in the state, those in non-public as well as public schools.



This legislation has been amended at times in order to comply with the principles and guidelines set forth in the applicable decisions of this Court. The state officials respectfully submit that the benefits available under Section 3317.06, *supra,* are limited to those which will promote the health and educational opportunities of children attending non-public schools. The benefit, if any, to the schools which these children attend is indirect and incidental.

The state officials, therefore, submit that the statute is constitutional under the three-part test established by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . .; finally, the statute must not foster "an excessive government entanglement with religion." (403 U.S. at 612-613.) (Citations omitted.)

The statute does have a secular legislative purpose. The state has a legitimate interest in the health and education of its children. The statute serves this interest by improving the quality of education throughout the state and by providing students with educational handicaps a meaningful educational opportunity.

The principal or primary effect of the statute neither advances nor inhibits religion. It makes available to all children in the state, those in non-public schools as well as public schools, benefits in the form of secular educational materials and health and remedial services. No benefits whatsoever are provided to sectarian schools.

The statute does not foster an excessive government entanglement with religion. The benefits available under the statute are provided to all students in the state. The only distinction between students attending non-public rather than public schools is the location where they

receive the benefits. The risk of political entanglement is, therefore, minimal. If there is a demand in the future to increase the level of benefits, the proponents will be those who generally favor remedial and special educational benefits for students. Political debate on the question will not be drawn along religious lines.

There is also little risk of administrative entanglement. There is no need for continuing government surveillance. The textbooks, materials and equipment need be examined only once to insure that their content is secular and incapable of diversion to sectarian use.

No services which have any relation to the educational function of a sectarian school will be performed on the school premises. There is, therefore, no risk that the personnel rendering the services will be "affected by an atmosphere dedicated to the advancement of religious belief" and no temptation for the sectarian schools to compromise their religious mission.

The parties have stipulated that the textbooks available under the statute will be limited to books, reusable workbooks or manuals intended for use as a principal source of study material for a given class, a copy of which is expected to be available for the individual use of each pupil in the class. (Stip. 20, App. 35-36.)

This portion of the statute is, therefore, identical to the programs upheld in *Meek* v. *Pittenger, supra,* 421 U.S. 349, and *Board of Education* v. *Allen,* 392 U.S. 236 (1968).

Under the Ohio law it is the school children, and not the sectarian schools, who are the direct beneficiaries of the instructional materials and equipment program. The materials and equipment are loaned to the pupils or their parents upon individual request. The sectarian schools receive nothing.

The materials and equipment are inherently secular and incapable of diversion to sectarian use. This eliminates



the problems caused by programs of financial aid. That type of aid necessarily presents a risk of either advancing religion or fostering excessive entanglement. In the absence of restrictions financial aid could be used to benefit either the educational or religious aspects of the sectarian schools. If restrictions were imposed it would require continuing government surveillance to insure compliance with the restrictions.

The materials and equipment need be examined only once to insure that their content is secular and incapable of diversion to sectarian use.

Appellants have conceded the validity of physician, nursing, dental and optometric services to children attending non-public schools. They claim, however, that the state may not provide diagnostic psychological and diagnostic speech and hearing services.

The parties have stipulated that the persons who perform these services merely identify the children who have speech and hearing handicaps or psychological problems. (Stip. 28(a), (b), App. 39.) These services are clearly public health services. The state may properly include children attending non-public schools in programs providing such services. *Meek* v. *Pittenger, supra,* 421 U.S. 364; *Lemon* v. *Kurtzman, supra,* 403 U.S. at 616.

Therapeutic and remedial services are available to students with learning disabilities who need special assistance in order to proceed at the same academic level as their more fortunate classmates. None of these services will be provided on the premises of a sectarian school. There is, therefore, no risk that the personnel rendering the services will be "affected by an atmosphere dedicated to the advancement of religious belief" and no temptation for the sectarian schools to compromise their religious mission.

The statute provides that the standardized tests and scoring services used in public schools are to be furnished by the local school districts to measure the progress of non-public school students in secular subjects. (Stip. 37, App. 48.)

The state may properly insist that all schools, non-public as well as public, meet certain minimum requirements as to the quality and nature of the curriculum. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 614; *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534 (1925). These tests furnish a non-intrusive means to determine whether these requirements are being satisfied.

This portion of the statute bears a superficial similarity to the program found invalid in *Levitt* v. *Committee For Public Education,* 413 U.S. 472 (1973), since both are concerned with tests. The programs, however, are readily distinguishable. In *Levitt* the state provided money grants to the non-public schools to reimburse them for testing. Money grants necessarily present a risk of either advancing religion or fostering excessive entanglement. (413 U.S. at 477.) No financial aid is involved in Ohio. The tests themselves are provided.

In *Levitt* the vast majority of the money grants was used to reimburse the schools for teacher prepared tests. Such tests are an "integral part of the teaching process." Since the tests were prepared by teachers under the authority of a sectarian institution it creates the risk that they would draft the tests with a view to advancing the religious beliefs of the sponsoring church. (413 U.S. at 480.)

In Ohio the tests are those prepared for, and used in the public schools.

The provision for field trip transportation is legally indistinguishable from the transportation found constitutional in *Everson* v. *Board of Education,* 330 U.S. 1 (1947). It merely enables parents to get their children safely and expeditiously to and from school.



## ARGUMENT

### The State of Ohio May Properly Make Available To All School Children In The State The Benefits Of A General Program To Lend Textbooks Free Of Charge.

Appellants contend that the Ohio program for lending textbooks is broader than, and therefore distinguishable from, the programs upheld in *Board of Education* v. *Allen, supra,* 392 U.S. 236, and *Meek* v. *Pittenger, supra,* 421 U.S. 349. They did not make this contention in the District Court.

Section 3317.06(A) defines a textbook as any book or book substitute which is used as a text or text substitute in a particular class. Appellants concede that they stipulated that textbooks available under the statute would be limited to books, reusable workbooks or manuals. This is identical to the description of textbooks in the Pennsylvania statute upheld in the *Meek case.* Appellants claim, however, that this stipulation only goes to the intent and policies of the Department of Education.

Appellants claim that the Department may at some time in the future change its policies. The public officials may then try to use the term "book substitute" to furnish items which are constitutionally impermissible. They claim that this is a possibility because the appellees argued in the District Court that there was no realistic distinction between textbooks and instructional materials and equipment.

The state officials respectfully submit that the Ohio program is identical to the programs upheld in the *Meek* and *Allen cases.*

The reason that the parties stated that the stipulation concerning the implementation of the statute reflected only the intent and policy of the Department of Education was that the appellants challenged the statute on its face and obtained a temporary restraining order enjoining its implementation.

The statute has been implemented, however, since the judgment of the District Court on July 21, 1976. If there had been any instances during this time where public officials had attempted to furnish impermissible items as "book substitutes," the state officials feel that appellants would have brought such attempts to the Court's attention.

The state officials argued below, and are arguing in this Court that the loan of instructional materials and equipment, as well as the loan of textbooks is constitutional. This does not mean that they are contending that there is no distinction between textbooks and materials and equipment. The General Assembly of Ohio obviously felt there was a distinction between these items or it would not have made separate provisions for them in the statute.

The substance of appellants' argument apparently is that the public officials may at sometime in the future attempt to furnish items as "textbook substitutes" which this Court has held may not be provided. There is always a risk that a public official will consciously or unconsciously violate the law. This is not sufficient to invalidate the law. *Tilton* v. *Richardson,* 403 U.S. 672, 679 (1971); *Board of Education* v. *Allen, supra,* 392 U.S. at 245.

Appellants also claim that *Board of Education* v. *Allen, supra,* 392 U.S. 242; and *Meek* v. *Pittenger, supra,* 421 U.S. 349; should be overruled. The only argument which they



make in support of their claim is a reference to the dissenting opinion in those cases.

The state officials respectfully submit these decisions should not be overruled. The beneficiaries of the Ohio textbook loan program are the students or their parents and the public. Including all students in the textbook loan program benefits the public by improving the quality of all education in the state. The benefit, if any, to the sectarian schools which the students attend is incidental and remote. If the decisions were overruled, therefore, it would not serve the objectives of the Establishment Clause but it would impair the public interest.

**The State Of Ohio May Properly Loan To Children In Non-Public Schools Secular Instructional Materials And Equipment Which Is Incapable Of Diversion To Sectarian Use.**

Appellants argue in substance that the program for the loan of instructional materials and equipment is invalid because the materials and equipment involved are similar to those involved in the programs found invalid in *Meek* v. *Pittenger, supra,* 421 U.S 349; and *Public Funds For Public Schools* v. *Marburger,* 358 F.Supp. 29 (D. N.J. 1973) *affd.* 417 U.S. 961 (1974); that the distinction in beneficiaries of the aid is constitutionally insignificant; that the lending of instructional materials and equipment is not analogous to the lending of textbooks because the materials and equipment are stored on the school premises and they are not limited to items which can be distributed to individual pupils.

The District Court distinguished the Ohio program from the programs found invalid in the *Meek* and *Marburger cases* on the basis of the distinction in the beneficiaries of the aid. The sectarian schools were the direct

beneficiaries in *Meek* and *Marburger*. The materials and equipment were loaned to the sectarian schools themselves.

In Ohio the sectarian schools receive no materials or equipment. They are loaned to the school children or to their parents. The beneficiaries of the aid are, therefore, the school children or their parents and not the sectarian schools.

The fact that such materials and equipment are available to children in non-public schools may make it more likely that parents may choose to send their children to such schools. This Court has stated, however, that this is not sufficient to invalidate the program. *Board of Education* v. *Allen*, *supra*, 392 U.S. at 244; *Meek* v. *Pittenger*, *supra*, 421 U.S. 360.

Appellants cite portions of the opinions in *Committee For Public Education* v. *Nyquist*, 413 U.S. 756 (1973); and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), in support of their claim that the beneficiaries of the aid are not constitutionally significant.

Both of those cases involved financial assistance, reimbursement grants in *Lemon;* and financial aid for maintenance and repair, reimbursement grants and income tax credits in *Nyquist*. This type of aid, by its nature, necessarily presents a risk either of advancing religion or of fostering excessive entanglement. In the absence of restrictions financial aid could be used to benefit either the educational or the religious functions of the sectarian schools. If such restrictions were imposed, it would require continuing and intrusive government surveillance to insure compliance with the restrictions.

The instructional materials and equipment available under Ohio law do not present this problem. They are required to be inherently secular and incapable of diversion to sectarian use. The materials and equipment need



to be examined only once to insure that their content is secular and incapable of diversion to sectarian use. There is no need for any further government involvement.

Appellants in their Brief continually disparage the loan program by referring to the materials and equipment as "ostensibly loaned" and to the program as a "legislative feint" and a "fiction." The only reasons they give for this characterization is that the program is not limited to items which can be distributed to individual pupils and that the statute authorizes the storage of the materials and equipment on the premises of the non-public school.

The state officials respectfully submit that whether or not particular instructional materials may be distributed to individual pupils should have no legal significance. The textbooks are expected to be available for the individual use of each pupil. Their only educational value, however, comes from their group use by the pupils in class. In fact the parties have stipulated that only those textbooks may be loaned which are to be used as the principal source of study material for a given class. (Stip. 20, App. 35-36.)

Whether or not a piece of instructional material is distributed to an individual pupil has nothing to do with whether he is the beneficiary of the aid. In some instances the parent would purchase the materials for his child if they were not loaned by the state. Appellants apparently concede that in this situation the benefit of the loan is to the child and not the sectarian school.

In other instances if the material or equipment were not loaned by the state, it would not be available at all. The state officials respectfully submit that the loan of these materials is even more important not only to the child but also to the state. If the child does not have available materials which educators feel are beneficial, he will not be able to obtain the education he otherwise could have had.

Besides the harm to the individual pupil, this would also result in harm to the public interest. It is in the public interest for each child in the state to obtain the best education possible.

The fact that the materials and equipment are stored on the school premises should have no effect on the validity of the program. The same was true of the textbooks in both New York and Pennsylvania. *Meek* v. *Pittenger*, *supra*, 421 U.S. at 361 n. 9.

**The State Of Ohio May Properly Provide Diagnostic Services To All School Children In The State.**

Appellants concede that the state may include non-public school children in programs providing physician, nursing, dental and optometric services. They contend, however, that diagnostic services to identify children with speech and hearing handicaps or psychological problems are not permitted.

In support of this contention appellants argue that public teachers and counsellors may not provide auxiliary services on the premises of a sectarian school; and that diagnostic speech and hearing and psychological services involve more communication than physician services.

The state officials recognize that *Meek* v. *Pittenger*, *supra*, 421 U.S. 349, held that the state could not provide auxiliary services on the premises of the sectarian school. The state officials submit, however, that there is an important distinction between the auxiliary personnel in *Meek* and the diagnostic personnel in this case. The auxiliary personnel were providing educational services. This was the reason the program was found unconstitutional. The opinion explains that since the auxiliary services were important educational services, if they are performed in schools in which education is an integral part of the sectarian mission,



there is some potential for the fostering of religion. (421 U.S. at 371-372.)

The services performed by the diagnostic personnel have nothing to do with education. The parties have stipulated that the persons who perform these services merely identify the children who have speech and hearing handicaps or psychological problems. (Stip. 28(a), (b), App. 39.)

These diagnostic services, like those provided by a physician or nurse, are public health services. The state may properly include children attending non-public schools in programs providing such services. *Meek* v. *Pittenger*, *supra*, 421 U.S. at 364 and 371 n. 21; *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 616.

**The State Of Ohio May Properly Include Children Attending Non-Public Schools In Programs Providing Therapeutic And Remedial Services So Long As They Are Performed In Public Facilities.**

The statute provides for therapeutic and remedial services for all students who require special treatment or assistance. Most of these students in public schools will receive the services in the school which they attend. Students in the non-public schools will receive the services in a public school, a public center or a mobile unit. The location will depend upon the distance between the non-public school and a public school or a public center, the safety of travel between the non-public school and the public school or public center and the accommodations in the public school or public center.

Appellants concede the validity of providing such services in public schools. They claim, however, that it is unconstitutional to provide the services in public centers or mobile units. In support of their claim they argue that

when mobile units are used to provide the services they will probably be stationed on public property close to a non-public school and the personnel will usually be providing services solely to non-public school students; that it is unlikely that public school students will receive services at a public center; and that substantial funds may be expended to erect public centers to provide these services.

The state officials respectfully submit that this program does not present any risk of fostering religion; that the arguments raised by appellants have no legal significance; and that these services are constitutional.

This Court in *Meek* v. *Pittenger, supra,* 421 U.S. 349, held that the state could not provide auxiliary services on the sectarian school premises. It found that there would be a constitutionally impermissible degree of entanglement between church and state in order for the state to be certain that the auxiliary service personnel did not advance the religious mission of the schools in which they served. The opinion makes it clear that the risk that such personnel would attempt to foster religion and the resulting need for state surveillance arose because the services were provided in sectarian schools.

> But they are performing important education services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. (421 U.S. at 371.)

The General Assembly of Ohio has eliminated any potential for fostering religion by providing that therapeutic or remedial services may only be provided in public facilities.

The fact that the mobile units may be parked close to a non-public school should have no effect on the validity of the services. The state officials respectfully submit that



a restriction on access to the services for certain students merely because they choose to attend sectarian schools would raise serious problems under the free exercise clause.

The fact that the personnel in a mobile unit or a public center may be providing the services solely to children attending a non-public school should also have no effect on the validity of the services. The services will still be provided in common to all students who have need of them. The only difference will be the location in which they receive the services.

This situation is not analogous to the situation in which the services are provided in the sectarian school. The centers or mobile units obviously do not maintain an "atmosphere dedicated to the advancement of religious belief." It is unrealistic to assume that a person rendering a remedial or therapeutic service will be so affected by the religious beliefs of the students receiving the service that he would be tempted to advance those beliefs. Even if there were a possibility that the personnel would be so affected, it would not be affected in any way by the statute. The same possibility would exist whether the students attended public or non-public schools and whether the services were performed in a public school, public center or mobile unit.

The construction of a center to provide therapeutic or remedial services would appear to be permissible. See, e.g., *Hunt* v. *McNair,* 413 U.S. 734 (1973). However, that issue is not raised in the instant case. Nothing in the statute authorizes the expenditure of funds for capital improvements.

No therapeutic or remedial services will be provided on the premises of non-public schools in Ohio. There is, therefore, no possibility that the auxiliary personnel will be affected by the religious atmosphere of a sectarian

school and no potential for fostering of religion. There would also be no possibility of provoking controversy between the auxiliary personnel and religious authorities over the services provided.

**The State Of Ohio May Properly Use Standardized Tests And Scoring Services In Order To Measure The Progress Of Non-Public School Students In Secular Subjects.**

Appellants claim that it is unconstitutional for the local school districts to provide standardized tests and scoring services to measure the progress of non-public school students in secular subjects. In support of their claim they rely upon *Levitt* v. *Committee For Public Education*, 413 U.S. 472 (1973).

The New York statute involved in *Levitt* provided direct money grants to reimburse non-public schools for a variety of state required services. The most expensive service was the administration and grading of tests and the compiling and reporting of their results.

This Court explained that there were two constitutional defects in the New York program. The first arose because of the form of aid, direct money grants to the schools. Such aid, in the absence of excessive government entanglement with religion, is incapable of restriction to purely secular use. (413 U.S. at 477.)

The other problem was that most of the tests involved were traditional teacher prepared tests. Such tests are an integral part of the teaching process. Since the tests were prepared by teachers under the authority of sectarian institutions there was a risk that they would be drafted with an eye to advancing the views of the sponsoring church. (413 U.S. 480.)



The statute provided a lump sum per pupil amount for a variety of services, some of which were secular and some religious. This Court, therefore, stated that it could not reduce the amount to that corresponding to the costs incurred in performing the reimbursable secular services. (413 U.S. at 482.)

Neither constitutional problem is present in Ohio. No financial aid is involved. The tests and scoring services themselves are provided. These tests are not prepared by teachers employed by sectarian schools. They are prepared for, and used in the public schools.

The parties have stipulated that the tests are used to measure the progress of students in secular courses. The state may properly insist that all schools, non-public as well as public, meet certain minimum requirements as to the quality and nature of the curriculum. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 614; *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534 (1925). These tests furnish a non-intrusive means to determine whether these requirements are being satisfied.

**The State Of Ohio May Properly Provide Transportation For Field Trips For All Children In The State, Those In Non-Public As Well As Public Schools.**

Appellants claim that the provision for field trip transportation under the Ohio law is distinguishable from the transportation found constitutional in *Everson* v. *Board of Education,* 330 U.S. 1 (1947). They argue that transportation of students to and from governmental, industrial, cultural and scientific centers (Stip. 38, App. 49) is more directly related to the education of the students than transportation to and from their classroom. They also argue that, because the occasions for field trip transporta-

tion are more difficult to anticipate there will be a greater potential for entanglement.

The state officials respectfully submit that the distinctions urged by appellants have no merit. The claim that field trip transportation is more directly related to education than classroom transportation is doubtful. In any event, in either situation, the program merely provides safe and expeditious transportation of students to and from school. *Everson* v. *Board of Education, supra*, 330 U.S. at 18.

The extent of transportation for field trips does not depend upon the "unilateral determination" of the non-public school administration. The statute limits the transportation available to non-public school students to that which is provided to the public school students in the district.

The state officials also submit that the fact that the need for field trip transportation is only occasional will cause fewer, not more, potential conflicts between non-public and public school students. The bussing needs for field transportation, as well as classroom transportation, can be anticipated and scheduled well in advance of the school year. Since field trip transportation is so infrequent it is unlikely that any potential conflicts will appear. If they do, and they cannot be immediately resolved, the school district may contract for the needed transportation.

The state officials respectfully submit that this portion of the statute is constitutionally indistinguishable from the program found constitutional in *Everson* v. *Board of Education, supra*, 330 U.S. 1.



## CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 1976

No. 76-496

BENSON A. WOLMAN, *et al.*,

*Appellants,*

*v.*

MARTIN W. ESSEX, *et al.*,

*Appellees.*

**On Appeal from the United States District Court for the Southern District of Ohio**

## BRIEF OF APPELLEES JAMES GRIT, et al.

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## BRIEF OF APPELLEES JAMES GRIT, et al.

## QUESTIONS PRESENTED

1. The State of Ohio permits the Ohio Department of Health or local public school districts to provide speech and hearing diagnostic services and psychological diagnostic services to nonpublic school pupils to the same extent that such services are supplied to public school pupils. These services, like medical-dental services, do not present any realistic potential for the inculcation of values, and there is no realistic fear that religiosity will intrude. Does

this program violate the Establishment Clause of the First Amendment?

2. The State of Ohio permits the Ohio Department of Health or local public school districts to provide therapeutic, remedial and guidance and counseling services to nonpublic school pupils to the same extent that such services are supplied to public school pupils. These services may be provided only at off-premise, neutral sites. Does this program violate the Establishment Clause of the First Amendment?

3. The State of Ohio authorizes local public school districts to loan to nonpublic school pupils such secular textbooks as are used by public school pupils in the public schools. It is stipulated that this program will be administered in the same manner as the textbook program in *Meek*. Does this textbook lending program violate the Establishment Clause of the First Amendment?

4. The State of Ohio has authorized local public school districts to lend to nonpublic school pupils auxiliary materials and equipment identical to those used in public schools. The lending program is administered by publicly-hired and controlled clerk-librarians. The materials have a fixed secular content and are incapable of diversion to religious use. Does this lending program violate the Establishment Clause of the First Amendment?

5. The State of Ohio permits local public school districts to furnish field trip transportation to nonpublic school children on the same basis as such transportation is provided to public school children. This includes transportation to governmental, industrial, cultural and scientific centers. Does this field trip transportation service violate the Establishment Clause of the First Amendment?

6. The State of Ohio permits local public school districts to furnish secular, standardized achievement tests and scoring services to nonpublic school pupils. The program does not include teacher-prepared tests or money grants. Does this standardized achievement test assistance violate the Establishment Clause of the First Amendment?



7. Once the State of Ohio has authorized a general welfare service to be supplied to all children, is it violative of the Free Exercise Clause of the First Amendment to deny such services to a child on the grounds that he remains a "sectarian citizen" even after he is released from the church-related school?

## SUMMARY OF ARGUMENT

### A. Introduction.

The State of Ohio has for the past ten years provided medical-dental, diagnostic, remedial and therapeutic services and secular materials and equipment to all children attending public and nonpublic schools in the state. This program has proven remarkably successful; has received broad-based community support and has alleviated handicaps which had forced children to cope with the learning process under stressful, physical and psychological burdens.

Although the constitutionality of this program had been upheld in the state and federal courts prior to 1975, the Establishment Clause concerns expressed in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), had to be accommodated. The Ohio General Assembly reacted in a responsible manner by adopting revised legislation which reflects an honest effort to satisfy the *Meek* criteria.

### B. Salient Features of Revised Program.

#### 1. On-Premises Diagnostic Services.

This branch of the Act authorizes diagnostic services to be provided at the nonpublic school. Diagnostic services,

like the medical-dental-optometric services, do not present any realistic potential for inculcation of values or for advancement of religion. The diagnostician, by definition, does not provide educational or instructional service.

The child at the diagnostic stage presents a series of symptoms which may be neurological, emotional, physical or medical in origin. He isn't ready for treatment; diagnosis must come first. In the diagnostic setting, the speech and hearing diagnostician or the psychological diagnostician uses a series of standardized and objective tests to procure and evaluate information and data. The question at this stage is simply whether there is a disability and, if so, what specialist should initially attempt to remove it.

In the *treatment* context, the roles are reversed. The person rendering the service is the giver and the student is the recipient. Hence the danger of inculcation of values. It is in response to this danger that treatment services are provided at off-premises, neutral sites.

**2. Off-Premises Therapeutic, Remedial and Guidance Services.**

*Meek* tells us that public employees who perform education services at church-related schools are likely to be influenced by the "religion-pervasive atmosphere" and succumb to sectarianism. The Ohio General Assembly responded to this concern by restricting therapeutic, remedial and guidance services to off-premises, neutral sites which would not be permeated by a religious atmosphere. This means that those services are now provided by public employees, under public control, at neutral facilities. Appellants argue that a nonpublic school child remains a "sectarian citizen" after he is released from the nonpublic school and will intimidate the publicly hired and controlled specialist into succumbing to sectarianism even at the neutral site. When appellants urge that nonpublic school



children must be denied secular, neutral and nonideological services at neutral facilities after they leave the nonpublic school premises, they are insisting upon a penalty for free exercise of religion.

**3. Loans of Secular Textbooks.**

The revised Act authorizes local public school districts to loan to nonpublic school pupils such secular textbooks as are used in the public schools. The parties stipulated the program will be administered identically to the Pennsylvania program before this Court in *Meek*. That decision and *Board of Education* v. *Allen*, 392 U.S. 236 (1968), thus leave little doubt that Ohio's textbook loan program is constitutionally permissible.

**4. Loans of Fixed-Content, Secular Materials and Equipment.**

Auxiliary materials and equipment identical to those used in public schools are loaned to nonpublic school pupils or their parents by a publicly-employed and controlled clerk-librarian. All such materials and equipment have a fixed, secular content and are thus wholly incapable of diversion to religious use. Since those items are not loaned directly to church-related schools and have a fixed neutral content, the effect of the program is secular. The self-policing nature of the materials and equipment loaned under the Ohio Act negates the need for continued surveillance and thus avoids administrative entanglement problems.

**5. Field Trip Transportation.**

If, as *Everson* v. *Board of Education*, 330 U.S. 1 (1947) held, it is acceptable for a state to provide transportation of students to church-related schools where a religious atmosphere obtains, the provision of similar transportation to religiously neutral governmental, industrial, cultural and

scientific places cannot offend the Establishment Clause. The service provided to nonpublic pupils is identical to that provided to their public school counterparts in a context totally free from religious overtones.

**6. Standardized Achievement Tests.**

The purpose of these tests is to provide normative data descriptive of current achievement in the nation's schools. They permit broadscale comparison of educational achievement. Standardized tests by definition result in precisely the same test being administered to all who take it. By definition, these tests have nothing to do with religion since they are prepared to test achievement in the secular courses taught at the public schools. The broader the base the more reliable the results.

The revised Ohio Act has nothing to do with teacher-prepared tests and does not reimburse schools for costs of testing or grading. Thus, the Ohio program is clearly distinguishable from *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973).

These standardized tests, like textbook and auxiliary materials and equipment loaned under the Act, have a fixed secular content. They cannot advance religion. They are not divertible to religious use.

**7. The Ohio Auxiliary Assistance Program Will Not Promote Divisiveness Along Religious Lines.**

Ohio can point to a ten-year history of a successful program that has been administered without divisiveness along religious lines. There is no reason to expect such divisiveness in the future.

The revised Ohio program extends secular, neutral and non-ideological benefits to all children in the state. The class of beneficiaries is defined by need rather than religious persuasion. The basic ingredient to presumed political divisiveness is "special benefit" and that is not present in this case. A legislative program that provides neutral assistance to all children rather than direct or indirect aid to churches isn't likely to engender political fragmentation along religious lines. Thus the lower court observed: "Since the services and materials provided under the statute may not exceed in cost or quality those provided to public school children, any political debate would, in the view of this Court, most likely relate to the need for and the merits of providing such services and materials to pupils in general rather than to those attending non-public school in particular." *Wolman* v. *Essex,* 417 F. Supp. 1113, 1125 (S.D. Ohio 1976).

## ARGUMENT

### I. A Ten-Year History of Auxiliary Assistance in Ohio.

#### A. Introduction.

Like any society, the State of Ohio has a clear right (if not a positive duty) to maximize the enlightenment and health of all its citizens by seeking to eradicate physical, emotional and neurological impediments to learning. Crowded prisons, hospitals and mental institutions and extended unemployment and welfare rolls bear grim witness to the need for all that can be done.

No segment of society can or should be ignored in this effort. It is with this goal firmly in mind (not an effort to sponsor, support or become actively involved with religion) that the Ohio General Assembly has sought to provide the same diagnostic, therapeutic and remedial services to nonpublic school children that it provides to their peers who attend public schools. This program has been in effect in the State of Ohio since 1967, has enabled many handicapped and underprivileged children to achieve according to their true potential and to respond meaningfully to the challenges that will confront them as adult citizens. *The recipients of this assistance are defined by their needs rather than by religious persuasions.* The program also permits public school administrators to select for nonpublic school pupil use educational materials which have a fixed content, which are incapable of diversion to religious use and which are being used by public school pupils.

No public funds flow to any nonpublic school, its students or their parents. The loan of all religiously neutral material is to the students and not to the schools. The health, remedial and therapeutic services are provided directly to the students by public employees with no intervention by nonpublic school officials. No services having any realistic potential for the inculcation of values (whether religious or other) are provided on nonpublic school grounds. The entire program was established and is being administered by local public school districts as part and parcel of the same chapter of the Ohio Revised Code which regulates state aid to public school pupils.[1]



#### B. Prior Constitutional History.

The constitutionality of Ohio's auxiliary service program was tested and upheld in the state and federal courts[2] prior to *Meek* v. *Pittenger*, 421 U.S. 349 (1975). But, the concerns expressed in *Meek* had to be accommodated; the program had to be revised.

The pre-*Meek* three-judge court decision upholding the constitutionality of this program was vacated and remanded by this Court for further consideration in light of the decision in *Meek*. But prior to such reconsideration, the Ohio General Assembly repealed the former law and adopted a substitute version. The revised legislation represents an honest and responsible effort to bring the law within the framework of the *Meek* criteria. It would be difficult for a state to do more to structure its response to an urgent need in a manner more obedient to the dictates of the Establishment Clause as interpreted by this Court.

Appellants seem to feel that their equitable posture is improved because the substitute legislation seeks to accomplish the same basic purposes with the same amounts of money. *Appellees see no need to respond in apologetic fashion.* There is no question but that the legislature remains dedicated to the removal of learning impediments.

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[1]Chapter 3317, Ohio Revised Code.

[2]*P.O.A.U.* v. *Essex*, 28 Ohio St. 2d 79 (1971); *Wolman* v. *Essex*, U.S. Dist. Ct., S. D. Ohio, E. D., No. 73-292, vacated and remanded, 421 U.S. 982 (1975) (hereinafter "Wolman II").

Indeed, this Court has repeatedly upheld such a goal as a valid legislative purpose.[3]

Because the legislation tested by the three-judge court had been repealed, the parties in *Wolman II* entered into a consent order declaring the repealed law violative of the Establishment Clause of the First Amendment of the United States Constitution but reserving decision on the constitutionality of its successor.[4]

**C. Delayed Implementation of the Revised Act.**

Appellants filed a facial challenge to this revised legislation immediately after its enactment. The lower court issued a temporary restraining order which remained in effect (with the later exception of textbooks) until the declaratory judgment was rendered on August 5, 1976. After upholding the constitutionality of the Act, the three-judge court refused to enjoin implementation during appeal. Appellants unsuccessfully applied to Justice Stewart, and then to Justice Marshall, for injunctive relief. The new legislation has been in effect in Ohio for approximately seven months, but its predecessor has been in effect since 1967.

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[3]*Meek* at 363.

[4]Pertinent portions of the consent entry recite:

"Counsel for defendants and intervening defendants have represented to this Court that they do not seek to urge distinguishing features between the Ohio legislation considered herein and the Pennsylvania legislation considered in *Meek* v. *Pittenger*, *supra*, and do not seek to urge the severability of various provisions in the Ohio legislation because the Ohio General Assembly has repealed that legislation and enacted new legislation (known as Senate Bill 170) providing non-public school pupil assistance.

• • •

"This order is not intended to address or adjudicate the constitutionality of Senate Bill 170."

[¶¶2 and 5 in November 17, 1975, Consent Order, *Wolman II*.]



**II. Subversion of Legislative Intent Cannot Be Presumed in a Facial Challenge.**

Appellants and appellees cooperated to bring this constitutional challenge before the federal courts without delay. All parties sought to have the law tested as soon as possible. Much effort was put forth in the development of an extensive stipulation of facts. Appellants quite properly in the court below addressed themselves to the facial terms of the Act and the stipulations. However, now that appellants are dissatisfied with the three-judge federal court result, they have conjured up a series of presumed potential abuses which are completely *dehors* the record.

Appellants have gone far beyond the record and realism in asking this Court to presume outlandish abuses. For example, they would have this Court assume that the local public school districts will, without statutory authorization, build special parochial school annexes or purchase church-related school parking lots so that new centers or mobile units can be established closer to the nonpublic school.

Subversion of legislative intent most definitely cannot be assumed to support a facial constitutional challenge:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional."
>
> [*Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971).]

In the most recent decision on this subject, Justice Blackmun commented on the practice of this Court with respect to facial challenges:

"It has not been the Court's practice, in considering facial challenges to stautes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds."

[*Roemer* v. *Maryland Public Works Board*, 49 L. Ed. 2d 179, 196 (1976).]

Appellants and *amici* have done an ingenious job of highlighting emotional appeal. The casual reader is bound to be impressed by such catchwords as "the dark and bloody background," "parochial satellites," "massive aid to churches," "interpreting heretical attitudes as psychological deviations," "free toothbrushes only to members of one religious sect," and "sectarian citizenship." But the use of such outrageous and misleading language only diverts attention from the true factual issues and constitutional principles that should govern this case.

This brief, therefore, shall be confined to the legal principles enunciated in the decisions of this Court and to the stipulations of this case rather than to the preposterous abuses and inflammatory language conjured up by appellants.

### III. A Religious Mission in Church-Related Schools.

Although we take issue with appellants' attempt to describe the health, remedial and therapeutic services provided to nonpublic school pupils at neutral premises as potentially sectarian, *there will be no effort to deny the religious mission of church-related, nonpublic schools in Ohio*. Most parents and children selecting those schools do so with the expectation of a religious mission. *There has been no attempt in the past to change the mission in order to qualify pupils for state assistance, and there will be no such effort in the future*. This is why appellants correctly



assert that appellees do not seek to justify the constitutionality of this legislative program by denying the religious mission of the church-related schools. With this acknowledged, we must nevertheless point out that appellants have not fairly and accurately described the nature and extent of the religious mission in those schools.

This brief is submitted in behalf of parents of the Catholic, Lutheran, Christian and Jewish Day Schools. Appellants sought only to identify characteristics of the Catholic schools, and the stipulations at pages 30 through 33 of the appendix are limited accordingly. There is no evidence in the record of the religious aspects of the Lutheran, Christian, Seventh Day Adventist, Jewish, Baptist, Episcopal and Quaker schools identified at page 29 of the appendix.[5]

The stipulations with respect to Catholic schools [App. at 31-33] show that the teachers include members of almost all religious faiths and sects, that the secular courses are taught basically the same as they are taught in the public schools, that students who are not of the Catholic faith are not forced to attend religious classes or participate in religious exercises, that religion is not fused into secular courses, that no teacher is required to teach or integrate religious doctrine in secular courses, that almost 70% of the teachers are lay teachers and that most religious teachers have discontinued the wearing of religious garb.

These stipulations demonstrate that the Catholic schools in Ohio do not fit the standard profile described in prior decisions of this Court and that the heretofore presumed differences between elementary, secondary and higher education may need reconsideration. However, since church-

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[5]"The 720 nonpublic schools in Ohio include 657 Catholic, 29 private and nonsectarian, 32 Lutheran, 15 Christian, 15 Seventh Day Adventist, eight Jewish, four Baptist, one Episcopal, and one Quaker."

[App. at 28-29.]

related schools in Ohio have a religious mission and intend to retain it, we urge that the constitutionality of the Ohio program be upheld because it provides secular, neutral and nonideological assistance rather than because the schools do not fit a standard religious profile.

## IV. Diagnostic and Health Services Are Not Instructional and Present No Likelihood of Advancement of Religion.

### A. Differences Between Teacher and Diagnostician.

The new Ohio Act establishes two distinct categories of service to nonpublic school pupils. The first category includes medical-dental and diagnostic services which may be provided to the disadvantaged pupil on the premises of the nonpublic school. The second category includes remedial and therapeutic services which must be provided off-premises in a public facility and a neutral atmosphere. The different treatment between the two categories of service is premised upon functional differences between the nature of the service and upon guidelines suggested in prior decisions of this Court.

The on-premises services authorized in subsections D, E and F of the Act include:

> "(D) * * * *speech and hearing diagnostic services* * * *.
>
> (E) * * * *physician, nursing, dental and optometric services* * * *.
>
> (F) * * * *diagnostic psychological services* * * *."
>
> [R.C. § 3317.06 (emphasis added).]

The three-judge court below recognized the differences between a teacher and a diagnostician:



> "Diagnostic services differ markedly from teaching services in that the ongoing and at times unpredictable communication between the pupil and the teacher is not present in the diagnostic process directed toward the isolation of particular professionally recognized symptoms of physical or mental difficulties present in a child."
>
> [*Wolman* v. *Essex*, 417 F. Supp. 1113, 1121-22 (S. D. Ohio 1976).]

Diagnostic services do not present the potential for inculcation of values. In the diagnostic setting the diagnostician is receiving information and data. He is a recipient of facts; not an inculcator or a teacher. In the *treatment* context, however, the roles are reversed. The person rendering the services is typically the giver and the student the recipient. Hence, the danger of inculcation of values in the treatment setting and the need for off-premises rendition of such services.

Appellants at page 32 of their brief concede the facial constitutionality of the physician, nursing, dental and optometric services authorized by subsection E, but contest the constitutional validity of the on-premises speech and hearing and psychological diagnostic services.

Like the medical-dental services which are provided on-premises, diagnostic services are health related because the pupil at that stage simply evidences a defect or disability. It is unknown whether the cause is physical, mental, emotional or neurological. The pupil isn't ready for therapy or remedial service; diagnosis must come first. The diagnostician whether he be a physician, nurse, dentist, optometrist, speech and hearing diagnostician or psychological diagnostician, must use an interdisciplinary approach. Speech and hearing diagnosticians would indeed be ineffective if they couldn't recognize a problem that needed intervention by a

physician. Likewise, a nurse will hopefully recognize symptoms suggesting the need for psychological diagnosis. Since these services are all health related, there should be no fear that the doctor, nurse or diagnostician will succumb to sectarianism. *The diagnostician, by definition, does not provide educational or instructional service.* The question at this stage is simply whether there is a disability and, if so, what specialist should initially attempt to remove it.

**B. On-Premise Diagnostic Services.**

A child can more readily be sent to an off-premise neutral facility once a specific therapeutic or remedial program is indicated. However, it would indeed be cumbersome to send the child off-premises on multiple occasions for different forms of diagnostic testing if such can be provided on-premises absent any realistic potential for religious involvement.

The Ohio General Assembly in separating the situs of diagnostic services from treatment services was guided not only by the functional distinctions but also by footnote 21 to this Court's opinion in *Meek* which suggests that diagnostic services would not have been stricken had the severability doctrine been urged:

> "Act 194's authorization of 'speech and hearing services,' at least to the extent such services are diagnostic, seems to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools. See, e.g., *Everson* v. *Board of Education*, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504, 168 ALR 1392. Although the Act contains a severability clause, Act 194, § 2, in view of the fact that speech and hearing services constitute a minor portion of the 'auxiliary services' authorized by Act 194, we cannot assume that the Pennsylvania General Assembly would have passed the law solely to provide such aid. See *Sloan* v. *Lemon*, 413 U.S., at 833-834, 37 L. Ed. 2d 939, 93 S. Ct. 2982. Indeed, none of the appellees has suggested that the severability clause be utilized to save any portion of Act 194 in the event this Court finds the major substance of the Act constitutionally invalid.
>
> [*Meek* at 372 n. 21.]



Unlike the situation in *Meek*, the severability of the various categories of assistance provided under the Ohio Act is conceded by counsel for appellants.

The stipulations entered into between the parties make it quite clear that the diagnostician *identifies* deficiencies which are thereafter treated off-premises.[6] It is also acknowledged that diagnostic tests are typically conducted individually in a separate portion of the school building.[7]

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[6]Stipulation No. 25. These services are to be provided in the nonpublic school and would include speech and hearing diagnosis, psychological diagnosis and physician, nursing, optometric and dental diagnosis. The purpose of these services will be towards determining if nonpublic pupils are deficient or in need of assistance in these areas. For example, the speech and hearing therapist would screen children to identify those with speech or hearing deficiencies. Treatment, if any, of the defect would take place off the nonpublic premises. Personnel (with the exception of physicians) employed to perform these services are employees of the local board of education. Physician service will be on a contract basis if that procedure is followed in the local public school district.

[App. at 37-38.]

[7]Stipulation No. 29. If sample health diagnostic specialists in each of these areas were called to testify, they would testify that the pupils requiring their services would typically be taken from the classroom individually and that the diagnosis would be provided in a separate room or area of the building.

[App. at 41-42.]

**C. Standardized Diagnostic Procedures.**

In an effort to abandon the stipulations at this late stage of the proceedings, appellants now describe the functions of the diagnostician as if he were engaged in therapeutic, instructional and educational service. At pages 36 and 37 of their brief, they inaccurately contend that the diagnostician will intrude into the social and behavioral aspects of the pupil's personality; use religious influence; tinker with the attitudes and personality of the pupil in the setting of a religious institution; evaluate the mental processes of children in a church; and interpret irreverent or heretical attitudes and beliefs as psychologically deviant or antisocial. These contentions simply ignore the fact that the role of the diagnostician is to test rather than treat — to ascertain facts rather than inculcate values.

The court below properly perceived the function of psychological diagnosis and accurately interpreted the stipulation of facts:

> "[Y]et this Court perceives a significant distinction between psychological diagnosis and psychological treatment. Psychological treatment would ideally involve an ongoing relationship with the particular child and would attempt to deal with the child in the context of his entire environment, including his educational environment, thus giving rise to the dangers articulated in *Meek*. Psychological diagnosis, on the other hand, requires only relatively limited contact with the child, and the procedures employed during such contact are more easily governed by objective and professional testing methods directed, not toward the ultimate rehabilitation of the child, but toward isolating professionally recognized symptoms."
>
> [*Wolman*, 417 F. Supp. at 1121.]



To be sure, a *treating* psychiatrist or psychologist could be presumed to have more communication with a student than would a physician or nurse. But at the *testing* level the psychologist is typically using standard diagnostic tests. Their role is to be aware of and administer the appropriate tests, to recognize the contributions and limitations of tests and to interpret the composite test results. The diagnostic tests used by the psychologist are divided into four categories.[8] There are intelligence tests, specialized tests oriented toward relatively specific areas of functioning, education achievement tests and projective tests. There are 58 accredited tests within these four categories. These are the tools of the psychological diagnostician.

Turning from psychological to speech and hearing diagnosis, appellants would have this Court ignore the interdisciplinary approach to speech and hearing diagnosis and the medical aspects of this particular discipline. Appellants fail to note that hearing and visual diagnostic tests are by statute specifically regulated by the Ohio Department of Health.[9] Audiometric evaluations, for example, consist of a two-phase testing procedure for hearing defects:

> "In general, the following two-phase testing procedure is utilized:

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[8]Ohio Department of Education, The Intern Program in School Psychology (1969).

[9]The pertinent portions of § 3313.69 of the Ohio Revised Code read:

"The board of education or board of health providing a system of medical and dental inspection of school children, as authorized by section 3313.68 of the Revised Code, shall include in such inspection tests to determine the existence of hearing and visual defects in school children. The methods of making such tests and the testing devices to be used shall be such as *are approved by the department of health*." (Emphasis added.)

I. A sweep test:
Generally, nurses or specifically trained volunteers conduct sweep tests, rather than school speech and hearing therapists. If a child fails to hear one or more tones in either ear at frequencies of 250, 500, 2,000, 4,000 and 8,000 Hz at a sound pressure level of 25 dB, (ISO, 1964), a threshold test should be given.

II. A threshold test:
Trained nurses and school speech and hearing therapists should conduct the threshold tests of hearing acuity of any child who fails a sweep test.

[Ohio Department of Education, Ohio School Speech and Hearing Services (1972), pp. 62-63.]

The symptoms confronting the diagnostician of speech handicaps are not tested by the "unrestricted and comprehensive religious conversations" suggested by appellants. The basic functions of the speech diagnostician are to:

"II. Provide diagnostic services for children with speech handicaps. These problems include:

A. Defects of articulation.

B. Stuttering.

C. Voice disorders.

D. Disorders of speech and voice associated with organic abnormalities such as hearing losses, cerebral dysfunctioning and cleft palate.

E. Speech disorders associated with delayed or disturbed language development.

F. Hard of hearing."



[Ohio Department of Education, Ohio School Speech and Hearing Services (1972), p. 31.]

The medical implications in diagnosis of speech problems quite obviously include a determination, for example, as to whether the teeth, tongue, lips and palate are capable of producing correct speech. What do appellants see in this that readily lends itself to the inculcation of religious values? One would be required to assume the grossest deviation from professional duties to find even the slightest chance of abuse.

Since the personnel assisting pupils pursuant to subsections D, E and F of the Ohio Act are isolating and diagnosing the cause of symptoms rather than providing educational or instructional service, they are akin to the physician, the nurse, the health inspector, the safety inspector, the minimum standard education inspector, the policeman, or fireman who enters the nonpublic school. If a police officer can enter a church-related school to protect a child from one form of harm, why can't a psychological diagnostician enter and protect him from a far more pernicious harm which, if uncorrected, could plague him the rest of his life?

**V. Specialized Remedial and Therapeutic Service Will Be Provided At Neutral Facilities By Employees of The Ohio Department of Health or The Local Public School District.**

**A. Removal of Therapeutic and Remedial Services From Nonpublic School Premises.**

Off-premise services authorized pursuant to subsections G, H and I of the Ohio Act include: therapeutic, psychological, speech and hearing, guidance and counseling and remedial services. The remedial reading teacher performs a combination of health, remedial and education services.

The speech and hearing therapist likewise provides therapy designed to eliminate health and educational impediments. The school psychologist is concerned with psychological barriers to the learning process. The guidance counselor is likewise providing a myriad of health, remedial and educational services. These are education related services which carry at least some potential for the inculcation of values. This explains the off-premises restriction in the new Act.

The assistance program before this Court in *Earley* v. *DiCenso*, 403 U.S. 602 (1971), called for a 15% annual salary supplement to teachers of secular subjects in nonpublic elementary schools. In declaring the statute unconstitutional under the Establishment Clause as fostering excessive entanglement between government and religion, Chief Justice Burger in the majority opinion stressed the fact that the teacher was under "religious control and discipline." 403 U.S. at 617.

The Rhode Island program failed to meet constitutional muster because of the potential for impermissible fostering of religion and because of the comprehensive, discriminating and continuing state surveillance required to insure adherence to First Amendment restrictions.

The drafters of the Pennsylvania legislation considered in *Meek* obviously felt that the potential for impermissible fostering of religion would not be present if the state provided auxiliary service personnel who were hired by and under the control of the local public school district. However, Justice Stewart, in speaking for the majority, found that this did not sufficiently eliminate the need for continuing surveillance:

> "To be sure, auxiliary service personnel, because they are not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. Cf. *Lemon* v. *Kurtzman*, 403 U.S., at 618, 29 L. Ed. 2d 745, 91 S. Ct. 2105. But they are performing important educational services *in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained.*"
>
> [421 U.S. at 372 (emphasis added).]



Justice Stewart also commented upon the situs where the services were performed at other portions of the opinion.

> "The 'auxiliary services' authorized by Act 194 — remedial and accelerated instruction, guidance counseling and testing, speech and hearing services — are provided directly to nonpublic school children with the appropriate special need. *But the services are provided only on the nonpublic school premises,* and only when 'requested by nonpublic school representatives.'"
>
> • • •
>
> "The appellants concede the validity of this secular legislative purpose. Nonetheless, they argue that Act 194 constitutes an impermissible establishment of religion because the auxiliary servives are provided *on the premises of predominantly church-related schools.*"
>
> [421 U.S. at 367-68 (emphasis added).]

When one considers the frequent stress in the *Meek* opinion upon the situs of service along with footnote 17, it seems apparent that this Court did not intend that auxiliary

services should be denied to children simply because they exercised their constitutional right to select a church-sponsored school:

> "The appellants do not challenge and we do not question, the authority of the Pennsylvania General Assembly to make free auxiliary services available to all students in the Commonwealth, including those who attend church-related schools. Contrary to the argument advanced in a separate opinion filed today, therefore, this case presents no question whether 'the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic, or other church-sponsored school.' "

[*Meek* at 368 n. 17.]

The framers of the revised Ohio Act interpreted *Meek* as permitting remedial services at neutral facilities.[10] If this is not what footnote 17 meant, then it is difficult to see how Chief Justice Burger's criticism can be avoided:

> "But this holding does more: it penalizes *children* — children who have the misfortune to have to cope with the learning process under extraordinarily heavy

[10]This was most definitely a safe assumption; this is the Ohio program; this is the one that is addressed in this brief. Appellants at page 42 n.28, gratuitously suggest that *Meek* may have invalidated Title I of the Federal Elementary and Secondary Education Act. We believe not, but leave that question for later consideration. A constitutional challenge to the federal program is pending in the Southern District of New York. [Pearl *Amici* Bf., p. 2.] The constitutional question with respect to Title I of ESEA should be explicitly reserved until a record describing its unique features is developed.



> physical and psychological burdens, for the most part congenital. This penalty strikes them not because of any act of theirs but because of their parent's choice of religious exercise.
>
> * * *
>
> "To hold, as the Court now does, that the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic, or other church-sponsored school does not simply tilt the Constitution against religion; it literally turns the Religion Clauses on their heads."

[421 U.S. at 386-87.]

**B. Denial of Services Absent State Assistance.**

During the 1960's, it became apparent that millions of children in this country needed the benefit of "auxiliary services" in order to participate meaningfully in state-accredited education and to become productive members of society. *The problem that existed then still exists today. These services are extremely expensive. Only the most affluent of parents can afford to employ private auxiliary service specialists.* Prior to the enactment of the predecessor of the current Ohio program, auxiliary services simply weren't available to nonpublic school children. Without such state assistance today, the disadvantaged nonpublic school child would be confronted with the melancholy consequence so vividly described by Chief Justice Burger in *Meek*:

"The melancholy consequence of what the Court does today is to force the parent to choose between the 'free exercise' of a religious belief by opting for a sectarian education for his child or to forego the opportunity for his child to learn to cope with—or overcome—serious congenital learning handicaps, through remedial assistance financed by his taxes. Affluent parents, by employing private teaching specialists, will be able to cope with this denial of equal protection, which is, for me, a gross violation of Fourteenth Amendment rights, but all others will be forced to make a choice between their judgment as to their children's spiritual needs and their temporal need for special remedial learning assistance."

[421 U.S. at 387.]

Perhaps the best way to determine the historical situation with respect to learning disabilities in the church-related schools in Ohio prior to the enactment of state auxiliary service legislation is to look at the record testimony in *P.O.A.U.* v. *Essex, supra*. One of the witnesses who testified in that case was a speech and hearing therapist, Clarion E. Johnston. Pertinent portions of her testimony were:

"Q. When you first started performing these [speech and hearing therapy] services for the parochial school pupils, what were your first endeavors?

"A. To screen the speech and hearing of all the parochial schools so we would have a list with which to begin. All the children in the odd grades were screened for hearing, and the even grades were screened for speech plus any referrals from teachers.

• • •

"Q. What percentage of the children that you have



tested for hearing defects fell below the acceptable hearing norms?

"A. About eight-and-a-half per cent of the children failed the initial screen.

"Q. That is, for hearing?

"A. For hearing.

• • •

"Q. What percentage of the pupils tested failed to pass the speech test when you first tested them?

"A. Twenty-six per cent.

• • •

"Q. Now, in the public schools I think you said something about on cross-examination—or, I mean, on direct examination, that you found around eight per cent hearing deficiency and about 26 per cent of speech deficiency, is that correct?

"A. That is in the parochial schools that I tested, these three.

"Q. Now, what about the public schools that you checked, what would the percentages be there?

"A. I think it would be much lower, since the service has been put in the public school for a longer time. We expected to turn up an awful lot of problems this year, which we really did *because they have never had this service.*"

[*P.O.A.U.* v. *Essex*, Record, at 378-84, 387 (emphasis added).]

The guidance counselor who testified in that trial also confirmed the fact that no such services were available in the church-related school prior to the initiation of the state program [with the exception of one part-time person under the federal program]:

"Q. How long have you been employed by the Columbus Public School System or of the Public School System?

"A. Sixteen years.

"Q. Is there any difference at all between the services you perform for the kids in the schools that you are now serving and the kids in the public schools?

"A. No, sir.

"Q. Did the schools that you are now located at have competent trained guidance personnel before you got there?

[Objections deleted.]

"A. No. Wehrle did not have; Corpus Christi I am certain did not have; St. Mary's had had one of our personnel workers from the Federal programs; and St. Leo did not have."

[*P.O.A.U.* v. *Essex*, Record, at 240-41.]

The State of Ohio has tried its best to restructure its auxiliary service program to satisfy this Court's criteria because it knows how important these services are to disabled and disadvantaged children. Chief Justice Burger is quite right. If this program is cancelled, these services will no longer be available.

**C. Nonpublic School Children Should Not Be Denied Secular Services at Neutral Facilities After They Are Released From the Nonpublic School.**

If, as appellees suggest, auxiliary service personnel will ignore their professional training and succumb to sectarianism even while in a public facility because they are providing therapeutic services to a Lutheran, Catholic or Jewish child, then why wouldn't that same person succumb to



sectarianism when providing a similar service to any Lutheran, Catholic or Jewish child enrolled in a public school?

For example, referring to a guidance counselor who is counseling a nonpublic school child *at a public center*, appellants urge "A guidance counselor or psychologist may well be intimidated in his approach to a teen-ager's sexual or familial difficulties by the fact that the counseling is in the environment of a group possessed of a clear, orthodox religious dogma on the subject." [Appellants' Brief at 48.] What is the factual basis for this statement? Do appellants seriously contend that constitutional issues of this magnitude should be decided by such unsupported and unsupportable suppositions? Relative to appellants' group environment theory, it must be remembered that therapeutic service is usually individual or small group service:

> "If sample therapeutic service personnel in each of these areas were called to testify, they would testify that the pupils needing their services would be serviced either individually or with a small group of students having similar problems and that the service would be provided in the public school, public center or a mobile unit."

[Stip. No. 34, App. at 43.]

How can appellants ask this Court to presume that a Lutheran child will intimidate a guidance counselor located in a public center to succumb to sectarianism if that child is on release time from a Lutheran school but that a Lutheran child will not have such intimidating influence on the counselor if he is released from a public school?

*There is no professional, educational, legal or logical basis* for a presumption that a publicly-hired and controlled guidance counselor will succumb to sectarianism when a child released from a nonpublic school enters a public facility to receive therapeutic assistance.

The doctrine announced by the United States Supreme Court in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), tells us that children should not be disqualified from public benefits simply because they have been released from a church-related school. *If there is no constitutional infirmity in releasing a child from a public school classroom to receive off-premises religious training*, then *there certainly can be no constitutional infirmity in releasing a nonpublic school child from a nonpublic school classroom to receive a secular service.*

Justice Douglas who wrote the majority opinion in *Zorach* described the program considered by the Court in the first paragraph of his opinion:

> "New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instructions."
>
> [343 U.S. at 308.]

In distinguishing the *Zorach* program from the one considered in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), Justice Douglas concluded:

> "We follow the McCollum Case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion."
>
> [343 U.S. at 315.]



The contacts between church and state were substantial in the *McCollum* case and minimal in *Zorach*. Although appellants assert that the change in situs, like other changes in the Ohio program, is nothing more than a sham, the fact is that the situs of instruction in *McCollum* and *Zorach* did indeed have meaningful First Amendment significance. The situs of remedial and therapeutic service in our case has even greater significance because of the new entanglement test first announced by the United States Supreme Court in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). The situs of the therapeutic and remedial service is equally significant because of the presumption that the atmosphere of a church-related, nonpublic school is religion-pervasive; whereas the public school, public center or mobile unit parked on public premises is not.

### D. Free Exercise Implications of Branding a Child as a Sectarian Citizen After He Is Released From the Church-Related School.

Appellants are not content to place a sectarian label on pupils while they are in attendance at church-related schools. They insist that a child attending such school be branded a "sectarian citizen" wherever he goes. To be sure, they are willing to concede that he can go to the zoo and public recreation parks *like nonsectarian citizens*, but the sectarian badge must stand as a barrier when he seeks to receive secular, neutral and nonideological services even in public facilities.

Appellants' approach is typified by the statement at page 48 of their brief that "Moreover, even though the services may be provided at a nonsectarian site, under S.B. 170,

they will be provided to an *identifiable sectarian group.*" Why must appellants label these children as sectarian after they leave the church-related school? Are these children identifiable sectarian children when they go to the movies; when they enter the grocery store; when they participate in dances with other children; or when they go to the library?

In an effort to support the proposition that a child attending a church-related school remains a member of a "distinct sectarian class" even after he leaves the premises of that school, appellants argue at page 47 of their brief that the furnishing of free toothbrushes only to Christians or only to Jews would be inconsistent with the Establishment Clause. We agree! But, we aren't here dealing with legislation which provides a benefit to members of one religious persuasion not available to others. It must be remembered that the services involved in this litigation are available to nonpublic school pupils only to the same extent that they are available to public school pupils.[11]

The Free Exercise Clause of the First Amendment will be little more than a meaningless phrase if children are to be classified as "part of a sectarian group" after they leave the premises of the church-related school. When appellants urge that children must be denied therapeutic and remedial services by public employees under control of the local public school district at public facilities because they are registered at church-related schools, *they are insisting upon a penalty for free exercise of religion.*

If appellants would follow a Lutheran child who attends a Lutheran school away from the school until he reaches a

[11]"No school district shall provide health or remedial services to nonpublic school pupils as authorized by this section unless such services are available to pupils attending the public schools within the district."

[R.C. § 3317.06.]



public library and insist that he be denied neutral services provided in that library because he is a member of a sectarian group, how much further would they follow him? It's one thing to urge that there is a religious atmosphere in a church-related school which prevents certain services from being provided on-premises. It's quite another to insist that this atmosphere follow the child like an omnipresent cloud when he is released from the nonpublic school.

We do not urge that the State of Ohio is under an obligation to provide auxiliary services to nonpublic school children. But it has decided in its own interest as well as that of the child to do so. The practical effect of adopting appellants' view would be to condition the availability of such services upon a parent's willingness to withdraw his child from a church-related school. That effect would clearly penalize the free exercise of constitutional liberties.

For more than a quarter of a century the Supreme Court has made it clear that a government may not deny a benefit, even a gratuitous one, to a person or class of persons on a basis that infringes his constitutionally protected interest – especially First Amendment interests. *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Speiser* v. *Randall*, 357 U.S. 513 (1958). "For if the government could deny a benefit to a person because of his constitutionally protected [First Amendment rights], his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'" *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972). Thus, the Court in *Sherbert* concluded:

> "This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other

faith, *because of their faith, or lack of it*, from receiving the benefits of public-welfare legislation.' "

[374 U.S. at 410.]

**E. Therapeutic and Remedial Services at Neutral Sites.**

At page 43 of their brief, appellants argue that the only difference between the Ohio law and the Pennsylvania law stricken in *Meek* is the "technical difference of title to the classroom." This isn't true. This Court was concerned with atmosphere in *Meek*. The services were stricken because they were performed "in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." 421 U.S. at 371. The Ohio program calls for the services to be provided in a *different atmosphere*. The importance of the change effected by the new Ohio Act is to remove all religiosity from the atmosphere where the service is provided.

Once the Ohio General Assembly decided that the therapeutic and remedial services would be provided at some facility other than the church-related school, options were somewhat limited. The Act permits such services to be performed in "the public school, in public centers or in mobile units located off the nonpublic premises ° ° °." R.C. § 3317.06 (G). The stipulation reveals that the selection of the appropriate facility in a given instance depends upon distance, safety and adequacy of accommodations.[12]

In urban areas, many of the public and nonpublic schools are located in close vicinity to each other. In such instances

[12]Stipulation No. 32. The determination as to whether these programs would be offered in the public school, public center, or mobile unit will depend on the distance between the public and nonpublic school, the safety factors involved in travel, and the adequacy of accommodations in public schools and public centers.



the public school serves as the ideal facility for providing remedial and therapeutic services if there is space available. If the public school and nonpublic school are in close proximity but space is not available, the public school-ground area serves as an ideal location for a mobile unit. Appellants, of course, delight in labeling this as "curbside services" and in describing the mobile units and public centers as parochial school annexes or "satellites." Such "word games" are no substitute for scholarly constitutional analysis.

If we are dealing with a rural, nonpublic school that does not have a public school or public center nearby, the mobile unit is an ideal facility. The mobility of the unit enables it to reach children at remote schools and to serve pupils at many different schools. These mobile units are, of course, self-contained and equipped with the therapeutic or remedial equipment needed by the therapist. *They are owned and and operated by public school districts whose officials establish their location and operational procedures.*

At page 49 of their brief, appellants argue "clairvoyance is not required to foresee that public centers, like mobile units, will generally be located as close to the parochial schools as possible." This is obviously accurate. If the local public school district seeks to arrange services to be provided at a public center, it quite naturally is going to look to the closest one possible. *After all, the whole purpose of the program is to help children and to remove impediments and disabilities.* It would be absurd to argue that the local public school district would try to find the most distant public center possible and transport the child great distances in order to satisfy appellants' interpretation of Establishment Clause restrictions.

Appellants stress the fact that although public school districts use mobile units for public school pupils, the mo-

bile unit stationed close to the nonpublic school will, except in unusual circumstances, be servicing only nonpublic school pupils. It would be unrealistic to suggest that anything other than this would be the case. Unless the public and nonpublic school are quite close to each other, a mobile unit servicing public and nonpublic school children is going to serve public school pupils when it's stationed close to the public school and nonpublic school pupils when it's stationed close to the nonpublic school. The crucial point is that "these units will not be parked on nonpublic premises."[13]

Although appellants will undoubtedly continue to refer to the mobile unit as a parochial satellite, the fact is that the utilization, availability and efficiency of such units preceeded the Act presently before this Court. Mobile library units, mobile driver training units and mobile therapy units have been in existence for quite some time. They are particularly adept for servicing small numbers of pupils at multiple school locations. Their utilization has also proven particularly appropriate where capital expenditures are not justified because of temporary shifts in enrollment.

After dismissing the mobile units as parochial school satellites, appellants argue that the public centers are also constitutionally infirm because they provide a special benefit to the "sectarian pupils" who will be receiving the therapeutic service at the public center. In other words,

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[13]Stipulation No. 31. These services would include therapeutic speech and hearing, therapeutic psychological, remedial, guidance and counseling, and services for children who are deaf, blind, emotionally disturbed, crippled, or physically handicapped. Each of these services can only be provided in the public school, in public centers or in mobile units located off the nonpublic premises. Personnel performing these services would be employees of the local board of education or under contract with the State Department of Health.

[App. at 42.]



the argument is to the effect that if a child who is enrolled in a Lutheran school, for example, leaves that school and receives a therapeutic service at the local public library, he is receiving a "special benefit" geared to a sectarian class.

Skipping for the moment the question of whether the Lutheran child is a "sectarian" when he is in a public library, we must ask appellants how that child is receiving a special benefit if he receives speech and hearing therapy at that public facility. By definition, he will only receive this service if the same service is provided to all public school children within the district having a similar need. What's the purpose of the service? The purpose is to remove the hearing deficiency. Are appellants suggesting that a child whose hearing definicency is removed while he is in a separate room in a public library is receiving a greater benefit than the public school child whose hearing deficiency is removed while he is treated by a therapist in the public school building. There is nothing sectarian about the service and there is no special benefit. This is, of course, why appellants stretch the free "toothbrush" argument to show a special benefit but in doing so hypothesize a benefit that's made available only to members of one religious faith and to no one else.

Appellants also ask the Court to assume that the local public school district will utilize state-appropriated funds to build new public centers for the purpose of providing benefits to "sectarian pupils." This is utterly absurd. The Act authorizes no such capital expenditures. All capital construction funds for our Ohio schools are raised by tax levies at the local level and indeed the State of Ohio provides no capital construction funds to any local school districts.

Appellants couple their "build new buildings" argument with the equally unsupportable assertion that the services

may be provided on parking areas presently owned by churches but transferred to the local public school district. This kind of abuse is not authorized by the statute and there's nothing in the stipulation of facts to suggest it would occur. The parties stipulated that "these units will not be parked on nonpublic premises."[14]

Appellants have challenged this legislation facially and entered into a factual stipulation. Even so, great portions of their brief are devoted to supposed facts not contained in the stipulation and to assumptions of outlandish abuse which haven't occurred and which aren't going to occur. *If trial counsel challenging the constitutionality of a state statute were permitted to have the Court assume the worst conceivable administrative abuses, it would indeed be a rare state statute that could withstand constitutional challenge.*

## VI. The Ohio Textbook Program Is Being Administered Identically to the Pennsylvania Textbook Program Upheld in *Meek*.

Although appellants' departures from the record have been noted in various sections of this brief, the most serious departure appears at page 53 of their brief. Appellants state that there are "significant distinctions" between the Ohio and Pennsylvania textbook programs. They then assert that the Ohio textbook loan program may be used to furnish items not approved in *Meek* or *Allen*. This assertion not only calls for an assumption of unconstitutional application; *it is in direct contradiction to the stipulation of facts.*

[14]Stipulation No. 33. If a program is to be offered at a public center such as a library, public meeting hall, firehouse, or recreation center, services may be available for public and nonpublic pupils at the same center. Although some local school districts in Ohio provide services to public school pupils in mobile units, when services are provided to nonpublic pupils in such units they will in all probability be stationed on public property close to the nonpublic school of attendance. These units will not be parked on nonpublic premises.

[App. at 42-43.]



Stipulations 17 through 20 describe the Ohio textbook program. The parties stipulated that the textbooks would be loaned to the pupils or their parents; that the loaning of the textbooks would be based upon individual requests; that the textbooks will be limited to the same secular textbooks as are used by public school pupils in the public schools; that common suppliers would be used to supply books to both public and nonpublic school pupils; and that the textbooks loaned under the Act would be limited the same as those under the Pennsylvania program.[15]

Stipulation No. 20 should be compared with the definition of textbooks in the Pennsylvania Act which appears in the third footnote to Justice Stewart's opinion in *Meek*. Stipultion No. 20 and that definition are identical. Counsel for the parties intended it to be identical. Thus, we frankly

[15]"17. Division A of 3317.06 of the Ohio Revised Code provides for the loaning of textbooks to pupils attending nonpublic schools or to their parents. The books that may be loaned are limited to those which are acceptable for use in public schools in the state.

"18. The loaning of textbooks will be based upon individual requests submitted by nonpublic pupils or their parents. These requests will be summarized by the nonpuplic school and forwarded to the appropriate public school official.

"19. The secular textbooks used in nonpublic schools will be the same as the textbooks used in the public schools of the state. Common suppliers will be used to supply books to both public and nonpublic school pupils.

"20. Textbooks, including book substitutes, provided under this Act shall be limited to books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group."

[App. at 35-36.]

find it hard to believe that counsel would now ask this Court to find that the program will be implemented contrary to this stipulation.

The parties explained the stipulation to the Court below at the time they presented a consent entry which permitted monies to flow for the purchase of textbooks during the pendency of the litigation.[16]

Judge Kinneary, who authored the unanimous opinion below specifically found:

> "On its face, this aspect of the statute is constitutionally indistinguishable from the textbook provisions upheld in *Board of Education* v. *Allen*, 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968) and in *Meek* v. *Pittenger*, *supra*, 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217. This Court is therefore of the opinion that that portion of § 3317.06 O.R.C. providing textbooks or textbook substitutes to nonpublic pupils or to their parents does not contravene the First or Fourteenth Amendments."
>
> [*Wolman*, 417 F. Supp. at 1117.]

Justice Stewart while explaining why the Pennsylvania textbook lending program in *Meek* did not offend the constitutional prohibition against laws respecting an establishment of religion, noted the lack of any evidence that the textbooks would be used for religious purposes:

> "Moreover, the record in the case before us, like the record in Allen, see e.g., 392 U.S. at 244-245, 248, 20 L. Ed. 2d 1060, 88 S. Ct. 1923, contains no suggestion that religious textbooks will be lent or that the books

[16]Docket Entry No. 18, dated February 13, 1976, is the consent order modifying the temporary restraining order and permitting expenditure of funds for the textbook lending program.



> provided will be used for anything other than purely secular purposes."
>
> [421 U.S. at 361-62.]

Justice Blackmun in *Roemer* again reminded us that parties challenging the constitutionality of textbook lending programs have been unable to show that secular textbooks would be put to other than secular purposes: "Since it had not been shown in *Allen* that the secular textbooks would be put to other than secular purposes, the Court concluded that, as in *Everson*, the State was merely 'extending the benefits of state law to all citizens.' " 49 L. Ed. 2d at 187-88.

Appellants have not only failed to show the Court that the secular textbooks lent to children in Ohio would be put to other than secular purposes, they have stipulated to the contrary.

Justice White's words are as true today as they were in 1968:

> "The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."
>
> [*Board of Education* v. *Allen*, 392 U.S. 236, 243-44 (1968).]

## VII. The Auxiliary Materials and Equipment Are Loaned Directly to Pupils, Are Used by the Pupils and Are Incapable of Diversion to Religious Use.

**A. Changes to Accommodate Concerns Expressed in *Meek*.**

The pre-*Meek* Ohio program called for the lending of auxiliary equipment and materials *directly to the nonpublic schools*. The post-*Meek* program calls for the lending of a more limited category of auxiliary equipment and materials directly to pupils and parents and authorizes the employment of public school clerical personnel who will administer the lending program without constitutionally objectionable entanglement. The duties of these new lending personnel are described in Stipulation No. 22.[17]

[17]"22. This Act authorizes the employment of clerical personnel by local public school districts to administer the process of loaning instructional materials and equipment to pupils or their parents. The duties of these clerical personnel will include the following:

a. Distribution of loan request forms

b. Receipt and cataloging of loan requests

c. Maintaining an inventory of instructional materials and equipment

d. Distribution of instructional material and instructional equipment to eligible nonpublic pupils or their parents

e. Collection of instructional material and instructional equipment

f. Maintaining custody and storage of materials and equipment

g. Performs all other duties necessary for the efficient implementation of the materials and equipment program."

[App. at 36-37.]



Stipulation No. 24 also demonstrates that only auxiliary equipment and materials readily identifiable as secular will be available for loan to nonpublic school pupils.[18]

The post-*Meek* program contains a specific legislative proviso that the materials and equipment may not be divertible to religious use and further limits materials and equipment to items which may be loaned to individual pupils or their parents. These differences are indeed constitutionally significant; they are differences in substance as well as form. These differences make the new Ohio program readily distinguishable from the program rejected in *Meek*.

The lending of either textbooks or secular educational materials to the pupil rather than to the church-related school is an important difference because of the religious character of the school. Justice Blackmun commented upon this difference in his opinion in *Roemer:*

> "The first [*Meek* program] was the loan of instructional materials and equipment. Like the textbooks, these were secular and non-ideological in nature. *Unlike the textbooks, however, they were loaned directly to the schools*. The schools, similar to those in Lemon I, were ones in which the 'teaching process is, to a large extent, devoted to the inculcation of religious values and belief.' Id., at 366, 44 L. Ed. 2d 217, 95 S. Ct. 1753. Aid flowing *directly to such 'reli-*

[18]"24. Most public schools will purchase all equipment and materials including those to be loaned to nonpublic pupils or their parents from common suppliers. Large systems will use the bidding process and include all items on the list regardless of whether or not they are to be used by the public or nonpublic pupil. The same personnel will make purchases for both public and nonpublic pupils and can readily assure that they are secular since they are purchased as public school items."

[App. at 37.]

*gion-pervasive institutions,*" ibid., had the primary effect of advancing religion."

[49 L. Ed. 2d at 192 (emphasis added).]

As a result of the post-*Meek* revisions, the Ohio material and equipment program is indistinguishable from the textbook program approved in *Meek*.

The significance of the identity of the recipient is highlighted by the fact that the *first sentence* in Justice Stewart's opinion in *Meek*, which distinguishes textbooks from the instructional material and equipment, stresses:

"Although textbooks are lent *only to students*, Act 195 authorizes the loan of instructional material and equipment *directly to qualifying nonpublic elementary and secondary schools* in the Commonwealth."

[421 U.S. at 362-63 (emphasis added).]

Justice Stewart in *Meek* explains that it is because of the predominantly religious character of the schools that *direct loans* of secular materials to them have a primary effect of advancing religion:

"But we agree with the appellants that the *direct loan* of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act."

[421 U.S. at 363 (emphasis added).]

The primary effect of the Ohio plan is not the advancement of religion because self-policing materials having a fixed content not divertible to religious use are lent directly to pupils and their parents and because the new Ohio Act



very carefully spells out "a lending library procedure" for dissemination of these materials to pupils. The new Act authorizes publicly-employed and controlled clerical personnel to administer the lending process. Even if self-policing materials required surveillance, the contact would be with a public employee.

The lending of auxiliary materials and equipment to nonpublic schools was rejected in *Meek* because of the religious atmosphere in those schools. *Yet the secular books were being used by pupils in precisely the same schools.* Since both the textbook and auxiliary material and equipment are self-policing and clearly identifiable as secular, there must indeed be another reason for the different treatment in *Meek*. The difference is indeed the identity of the recipient and the reduced or eliminated likelihood of excessive entanglement in implementation of the loan to the pupil and parent.

Appellants would undermine the significance of the direct loan to the pupils by suggesting that the materials and equipment really aren't used by the pupils like a textbook and that the loan concept is a sham. This misconception is understandable because of the changes that have occurred in the educational process.

**B. Individual Use of New Multisensory Aids.**

The ability of counsel to speak intelligently about educational assistance at the elementary and secondary level is inevitably impaired by the literal explosion in new educational concepts and techniques that has occurred during the past decade. Children today are exposed to a *multisensory educational approach* that will prepare them for the computer age that lies ahead. If appellants start out with a stereotyped vision of a classroom with a teacher, 30 students and a blackboard, they simply won't be able to

comprehend the extent to which schoolchildren are able to utilize auxiliary material and equipment lent to them under the Ohio program. We simply didn't have reading pacers, arithmetic machines, tachistoscopes, shadow scope readers, rotomatics, plastic hand viewers, teaching tapes, micro projectors and similar individual-use equipment when we were in school.

Educators of the 1960's and '70's have come to realize that the solitary lecture or textbook cannot reach out far enough to take advantage of the new horizons of knowledge. Appellants' contention that the educational equipment and materials loaned to students under the Ohio program are not really in the custody of and used individually by the children simply demonstrates a lack of awareness and appreciation of what takes place in the modern classroom.

Students are exposed to materials and equipment designed for individual use at the earliest educational levels. This equipment and material, of course, supplements the lecture by the teacher. The Montessori child, for example, will individually work with sound discrimination sets. These include multicolored cylinders which make their own individual sounds and aid the child in determining auditory discrimination. These same children may also individually use color coded cylinders to sharpen visual perception and improve concentration and muscle coordination.

Such early experiences prepare them for later individual use of pegboards, hand-eye manipulation units, fill-n-spill counters and similar materials designed to improve visual and tactile perception. Appreciation of math concepts are enhanced by the use of dominoes, geometric figures, numerods, flash cards, counting frames and a great variety of mini computers. The child is later able to work with self-instructional modalities, which include cassette tapes for



auditory, visual and kinesthetic approaches to reading skills.

When appellants suggest that maps aren't susceptible to individual use, this simply indicates that they haven't observed the great variety of map-cassette combinations which permit a student to follow cassette lessons with eight and a half by eleven maps that are colored or filled out by the pupil. The child isn't simply looking at a wall map; he creates his own map in compliance with the cassette lesson. To be sure, some of the materials may be used by more than one child, but if it has a fixed neutral content, what's the difference? It is indeed ironic that appellants repeatedly exalt substance over form yet suggest that the test for the lending of secular materials should be geared to factors unrelated to the evils against which the Establishment Clause protects.

**C. The Aids Have a Fixed and Neutral Content.**

Justice Stewart, in delivering the opinion of the Court in *Meek*, properly described these materials and equipment as "self-policing, in that starting as secular, nonideological and neutral, they will not change in use." 421 U.S. at 365. This is the only kind of material and equipment that is contemplated and loaned under the Ohio program. Appellants refer frequently to overhead projectors, but these may not be supplied under the Ohio Act because they *are divertible* to religious use.

By way of example, rudimentary computers are now available for all phases of math instruction. The more basic computers might, for instance, simply have a series of cubes in a container. The face of the cube will designate a problem. After the child answers it himself, he then pushes the cube. It rotates and reveals the correct answer on the reverse side. These are simply referred to as teaching machines.

For drill purposes, the children can check out push-button computers that are pre-programmed for lessons at various grade levels. The child first pushes a lesson button and a problem is flashed on a small screen. He pushes the appropriate buttons to answer the problem. If he gives a correct answer, the machine indicates this with a smiling face. If he gives an incorrect answer, there's a frown and the problem is reflashed until the child gets the right answer. This simply adds a dimension of venture to what other wise might be a boring school day.

Children can now receive tutorial service without a live tutor. Individual tutorgrams which can be used for a variety of subjects are available for this purpose.

Individual study is also facilitated by study-scope programs which include a great variety of subject areas. The child is given a pre-programmed cylinder containing a tube and paper program. The child simply turns the scope so that one window reveals a question and another window indicates the answer. These kinds of materials, equipment and programs are loaned directly to a pupil. They are suited only for individual use. Teachers today recognize that children achieve at different rates during different phases of their educational development. One, two or three children may need individual attention from the teacher while the others are directed to individual-use equipment and materials to supplement the earlier lecture.

With the benefit of self-instructional materials and equipment now available, today's student has the opportunity to experiment, explore and calculate his way to an exciting educational experience.

The individual use of state-provided auxiliary materials and equipment by pupils had been established as early as 1969 when the *P.O.A.U.* v. *Essex* case was tried in Ohio. The record in that case shows that even when the materials



were technically loaned to the school rather than the pupils, they were auxiliary in nature and used individually by the pupils. As page 273 of that record, Ms. Fulton, a fourth-grade teacher at St. Paul's School, explained the benefits of the audio-visual assistance program:

> "Q. Are the pupils, to your knowledge, at St. Paul's School, where you teach, benefitting from audio-visual assistance provided by the State legislation recently enacted in Ohio?
>
> "A. I think I can speak well for this, as I am also the audio-visual aids director at our school besides teaching the Fourth Grade. I have never in my teaching experience, although I realize it is limited experience, experienced the great—what word do I want to use—wealth of learning that all these materials has brought, and I have seen children that I did not believe would ever be able to accomplish much in school go out into our learning center where all of our materials are in plain view, go out and use these materials, work on an individual basis, and most all the children in our school know how to use every one of the machines that we have, and they are available for their use all day long."

**D. Aids Unavailable Before State Assistance.**

The record in that case also establishes that these auxiliary audio-visual materials were not available prior to the enactment of the state legislation except in the rare circumstance when they were purchased by parent groups. Reverend Applegate testified to this effect at page 312 of the *P.O.A.U.* v. *Essex* record:

> "Q. ° ° ° Now, if the State did not provide this money for you through the school districts and you pro-

vided the same service as the public schools provided, where would this money come from?

"A. We wouldn't be able to; you mean the services and the materials, the hardware and the soft ware we are receiving through 350?

"Q. Yes, sir.

"A. We wouldn't be able to do it."

**E. Situs of Storage Not Significant.**

At page 29 of their brief, appellants argue that there can be no loan to the pupil because materials and equipment are authorized to be stored on the nonpublic premises. Appellants apparently have failed to note that textbooks lent to students were stored on nonpublic school premises under both the Pennsylvania and New York textbook programs approved by this Court.[19]

**F. No Need for Administrative Entanglement Between Church and State.**

We are here concerned with the constitutionality of a program which loans secular, neutral and nonideological self-policing materials and equipment to pupils for individual use. This is what is described in the stipulations. This is what is now being implemented. The effect of this program is secular because the materials and equipment have a fixed secular content. There is no need to police their continued use since they are not divertible to religious

[19]"Under both the Pennsylvania and New York textbook programs the nonpublic schools are permitted to store on their premises the textbooks being lent to the students. Compare Department of Education, Commonwealth of Pennsylvania, Guidelines for the Administration of Acts 194 and 195, § 4.6, with Board of Education v. Allen, supra, at 244 n 6, 20 L Ed 2d 1060, 88 S Ct 1923."

[*Meek* at 361 n.9.]



purposes. Their secular nature, like that of textbooks, can be determined without entanglement with religious authorities. If someone wanted to make sure that the public school districts were supplying secular textbooks to the nonpublic schools, he could simply review *public school* purchase and supply lists. The same would be true with equipment and material supplied under the Ohio program; he could check with the public school purchasing agent or the public school lending librarian. If the public school authority has indeed provided nondivertible equipment and materials (and it is stipulated that this is what is being lent) there is no need for continued surveillance.

**VIII. Transportation of a Nonpublic School Child to a Science Center Will Not Advance Religion.**

The constitutional justification for school bus transportation to field trip events is essentially the same as that for transportation to and from school. *Everson* v. *Board of Education*, 330 U.S. 1 (1947). The New Jersey statute in *Everson* was declared constitutional even though "children are helped to get to church schools" and "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pocket." 330 U.S. at 17. Stipulation 38 tells us that the new Ohio Act will permit transportation for field trips only if such transportation is provided to public school students and that the field trips will consist of visits to governmental, industrial, cultural and scientific centers.[20]

[20]"38. Division L permits local public school districts to provide such field trip transportation services as are provided to public school students. Field trips would consist of visits to governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students."

[App. at 49.]

Appellants argue that these field trips enrich the secular studies of a student and bear a direct relation to the educational program. Having said this appellants must concede that bus transportation for field trip events is much less subject to attack than standard school bus transportation. Transportation to the field trip event takes a pupil to an enrichment experience. Transportation to school takes the pupil directly to the full educational experience. *Surely, if it is constitutional to transport a child to a church-related school, it is constitutional to transport that child to a scientific center, a governmental building, an industrial structure or a cultural center.* These are precisely the same sites visited by public school pupils in public buses.

Justice Black in *Everson* commented that: "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U.S. at 18. The same is true of the field trip transportation under the Ohio program. This legislation does no more than provide a general program of transporting public and nonpublic school pupils to governmental, industrial, cultural and scientific centers.

If appellants argue that children may not be transported in public buses to scientific centers and governmental buildings because they attend state accredited, church-related schools, they are confronted with the remonstrance in *Everson* that:

> "On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, non-believers, Presbyterians or the members of



> any other faith, *because of their faith or lack of it*, from receiving the benefits of public welfare legislation."
>
> [330 U.S. at 16.]

Appellants also assert without record support that field trip transportation of nonpublic school children will lead to excessive entanglement between church and state. School bus transportation of public and nonpublic school pupils has been administered in Ohio without entangling difficulties or religious pressures upon public school busing authorities for better than ten years. Appellants argue that there will be greater scheduling difficulties with respect to field trip transportation than standard transportation. This is based upon a lack of understanding of school transportation. The school buses and their drivers are extremely busy in the mornings prior to the beginning of the school day and in the evenings when the school day is completed. Intermittent transportation to field trip events during the school day creates no scheduling problems and results in more efficient utilization of capital expenditures. The excessive "entanglement" involves nothing more than a phone call to the local school district transportation coordinator.

## IX. Standardized Achievement Tests Are Incapable of Diversion to Religious Use.

The new Ohio Act has nothing to do with teacher-prepared tests. It does not reimburse schools for costs incurred in testing. No money flows to the nonpublic school or parent. It simply permits the local public school districts to send the standardized achievement test to the nonpublic schools and to arrange for the grading of those tests by the commercial publishing organizations which prepare and grade standardized achievement tests.

The purpose of these tests is to provide normative data descriptive of current achievement in the nation's schools.

"We hold that the lump sum payments under Chapter 138 violate the Establishmen Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specific services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial function."

[413 U.S. at 482.]

The standardized achievement test starts out secular and ends up secular regardless of whether it's administered in a public or nonpublic school. The three-judge court below stressed this readily identifiable secular feature:

"Unlike the testing program invalidated in *Levitt*, the program authorized by the Ohio statute does not involve tests prepared by nonpublic school teachers, and therefore cannot result in the danger of inadvertent religious indoctrination. Rather, the Ohio statute authorizes the provision of only those same tests and scoring services as are provided in the public schools of the local district. The content of such tests, then, is necessarily and without further precaution restricted to the secular content of the state-required secular courses taught in the nonpublic schools. Since nonpublic school personnel are involved in neither the substantive drafting of the tests nor in the scoring of those tests, there is no possibility of inadvertent injection of religious doctrine in the administration of the tests. Likewise, because nonpublic school personnel will be involved only ministerially in the administration of the tests, the program will not foster an excessive entangling relationship between the state and the church-related school."

[*Wolman*, 417 F. Supp. at 1124.]

These standardized tests, like textbooks and educational materials, have a fixed secular content. They cannot advance religion. Their constitutionality should be sustained.



They permit broadscale comparison of educational achievement. Standardized tests by definition result in precisely the same test being administered to all who take it. By definition, these tests have nothing to do with religion since they are prepared to test achievement in the secular courses taught at the public schools. The broader the base the more reliable the results.

The stipulations confirm that the tests are standardized, that they are the same tests and scoring services as are in use in the public schools and that they apply only to secular subject.[21]

*Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973), is instructive but involves an entirely different legislative program. In *Levitt*, the state reimbursed the church-related schools for the cost of record keeping and testing. The reimbursement included the cost of traditional teacher-prepared tests drafted by nonpublic school teachers. Chief Justice Burger, in delivering the opinion of the Court, observed:

"We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religions institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church."

[413 U.S. at 480.]

The concluding paragraph in Chief Justice Burger's opinion confirms the distinction between the Ohio and New York programs:

[21]Stipulation 37. Division J permits the local public school district to supply to pupils attending nonpublic schools such standardized tests and scoring services as are in use in the public schools of the state. Such tests are used to measure the progress of students in secular subjects.

[App. at 48.]

## X. The Ohio Auxiliary Service Program Does Not Benefit a Special Class and Will Not Promote Divisiveness Along Religious Lines.

The revised Ohio auxiliary service program extends a series of secular and neutral benefits to all children in the state. The class of beneficiaries is defined by need rather than religious persuasion. The basic ingredient to presumed political divisiveness is "special benefit" and that is not present in this case. Chief Justice Burger commented upon this "special benefit" ingredient in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971):

> "But in Walz we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations *that benefit relatively few religious groups*. Political fragmentation and divisiveness on religious lines are thus likely to be intensified."
>
> [403 U.S. at 623 (emphasis added).]

The lower court also commented upon the lack of special benefit while explaining why politically divisive fragmentation along religious lines was not likely to occur under the Ohio program:

> "Finally, although the programs authorized by the statute are dependent upon periodic appropriations, it is the conclusion of this Court that the potentially divisive political effect of the programs is minimal. The statute on its face provides services and materials to students attending nonpublic schools only to the extent that those services and materials are already available to children attending public schools. Additionally, the services and materials provided to students in nonpublic schools cannot exceed in cost or quality the services provided to students attending public schools. Therefore, this statute merely extends already existing programs to all students in Ohio. Since the services and materials provided under the statute may not exceed in cost or quality those provided to public schoolchildren, any political debate would, in the view of this Court, most likely relate to the need for and the merits of providing such services and materials to pupils in general rather than to those attending nonpublic schools in particular."
>
> [*Wolman*, 417 F. Supp. at 1125.]



Appellants' proclaimed fears of potential political divisiveness are not well founded. There is no need to speculate. Although Ohio cannot cite this Court to "a page of history" alluded to in *Walz* v. *Tax Commission*, 397 U.S. 664, 675-76 (1970), it can point to a ten-year history of a remarkably successful auxiliary service program which has strong community support and which has been implemented without evidence of political divisiveness along religious lines. The three-judge court below was familiar with the local scene and in the best position to determine whether a presumption of future divisiveness would be appropriate.

This legislation provides benefits to children in the true sense of the word. None of the benefits is capable of diversion to religious use; none can flow by conduit to alternate recipients; not one penny is channeled directly or indirectly to nonpublic schools. It starts with the child, it benefits the child, it ends with the child. General legislation which provides neutral assistance to all children rather than direct or indirect aid to churches isn't likely to engender political fragmentation along religious lines.

To be sure, the $44 million per annum appropriation which supports the omnibus legislation is large. Unfortunately, however, it is equally true that the great bulk of the

appropriation finances health-related services, both diagnostic and remedial, and such services are among the most expensive in our society today. But whatever the cost, the services under the Act are administered by the Ohio Department of Health and by specialists hired by local public school districts, and in no event may such services exceed the cost or quality of the services provided to public school students.

Since most of these services are provided on an individual basis, the cost would be prohibitive for most public or nonpublic school parents, but such cost is an excellent investment for the State of Ohio. If by removing barriers to meaningful and productive citizenship the state is able to keep only a small percentage of those served off unemployment and welfare rolls and out of penal institutions, the money has been well spent.



## CONCLUSION

The revised Ohio auxiliary service Act represents Ohio's responsible and honest effort to satisfy the dictates of *Meek* v. *Pittenger* and its continued commitment towards the eradiction of learning impediments which burden disabled, deprived and disadvantaged children in the state's public and nonpublic schools.

The revised Ohio Act is confined to secular objectives, and neither advances nor impedes religious activity.

The revised Ohio Act does not impair the objectives of the Establishment Clause. It does not result in sponsorship, financial support or active involvement of the sovereign in religious activity. The unanimous decision of the three-judge court below should be affirmed.

Respectfully submitted,

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Michael A. Heyne

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-496**

BENSON A. WOLMAN, *et al.*,

*Appellants,*

—v.—

MARTIN W. ESSEX, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

## REPLY BRIEF FOR APPELLANTS

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On Appeal From The United States District Court
For The Southern District of Ohio
Eastern Division

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# REPLY BRIEF FOR APPELLANTS

## Introduction

Because of limitations of time and a desire for brevity, appellants, in this reply brief, will respond only to certain salient points urged by the appellees. As to points not discussed herein, appellants rely on their brief-in-chief. The two classes of appellees who have filed separate briefs, namely the state defendants-appellees and appellees Grit, et al. (parents of nonpublic school pupils), will generally be referred to respectively as the "state defendants" and the "Grit defendants."



## Argument

### I.

### It is essential that the Establishment Clause validity of parochial aid measures such as SB 170 be assessed facially with a view to their potential for abuse; the alternative is excessive judicial entanglement.

A central issue in this case is the extent to which actual instances of inculcation of religion by state paid personnel and actual instances of intrusive entanglement must be shown before the federal courts can move to invalidate a measure such as SB 170 on Establishment Clause grounds. The Grit defendants strenuously assert that appellants go beyond the stipulated record when they express fear that this Act will create public annexes to church-related schools, religious infusion in purportedly secular services, and religious diversion of materials and equipment furnished by the state (see for example, Grit Brief, p. 11). To the contrary, appellants are doing no more than exploring the reasonable inferences from the statute and the record concerning potential for abuse.

At the threshold it must be remembered that the stipulation, insofar as it deals with the manner of the Act's implementation, expressly provides that the "new law has not been implemented ... Thus, the stipulation can only go to the intent and policies of the Department of Education rather than to the precise manner in which that intent of policy will or will not be carried out in all instances." (A. 49 S. 39).

At least since this Court's decision in Lemon v. Kurtzman, 403 U.S. 602 (1971), this Court has measured statutes which aid non-public elementary and secondary education by their potential for Establishment Clause abuse, rather than by their demonstrated record of abuse. To be sure, as the Grit defendants point out (Grit Brief, pp. 11-12), in cases involving aid to colleges and universities, where prospects for sectarian influence and excessive entanglement were otherwise held to be remote, this Court has declined to strike down laws based upon the mere "possibility" of unconstitutional application. See Tilton v. Richardson, 403 U.S. 672, 679 (1971); Roemer v. Board of Public Works, 426 U.S. 736, 96 S. Ct. 2337 (1976). And given the fact that the Federal Elementary and Secondary Education Act (28 U.S.C. §241(a) et seq.) does not itself mandate particular programs, this Court declined to consider its constitutionality based upon "hypothetical facts." Wheeler v. Barrera, 417 U.S. 402, 426-27 (1974). The history of private grade school litigation under state laws has been different.

In Levitt v. Committee for Public Education, 413 U.S. 472 (1973) it was not shown that the teacher-prepared tests paid for by the state were, in particular instances, skewed to a sectarian end. Nor was it established in Meek v. Pittenger, 421 U.S. 349 (1975), that projectors and maps furnished by the state were in a given situation employed in teaching religion; or that remedial reading teachers in a certain school taught dogma. The key to these decisions, and others like them, was that where there is a "potential for impermissible fostering of religion ... [t]he State



must be certain ... that subsidized teachers do not inculcate religion ..." Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971). "[A]ssistance of the sort here involved carries grave potential for entanglement ..." Committee for Public Education v. Nyquist, 413 U.S. 756, 794 (1973).

> "We need not decide whether substantial state expenditure to enrich the curricula of church-related elementary and secondary schools ... necessarily results in the direct and substantial advancement of religious activity. For decisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." Meek v. Pittenger, 421 U.S. 349 at 369 (1975) (Emphasis added, footnote deleted.)

Although the placement of the burden on the state to "ensure" against constitutional violations may be somewhat unusual, it is absolutely essential to the life of the Establishment Clause that the burden be placed there, and that this Court continue to entertain facial attacks upon statutes which threaten to breach the wall of separation with regard to the potential of such statutes for abuse.

An important reason for the necessity of this Court's laying down broad and clear facial rulings based on potential First

Amendment abuse in cases such as this is the unique character of the injury suffered by the statute's challengers, and the corresponding unique character of their standing.

The gravamen of the plaintiffs' complaint in cases such as this is that tax monies are being spent in violation of the religion clauses. See Flast v. Cohen, 392 U.S. 83, 103 (1968). Although this Court has acknowledged the sufficiency and importance of this nexus for federal standing (ibid.), it is clear that persons who would assert their right to prevent violations of the Establishment Clause face unusual problems. Unlike a person who has been unlawfully arrested or deprived of property without due process, the citizen whose taxes are subverted by an unconstitutional application of a broadly framed parochial aid law will not be likely to learn of the violation of his rights automatically or easily. The trend exemplified by this Ohio scheme is to scatter the administration of the state program among the hundreds of local school districts and to keep minimal records of how the funds are spent. The expenditures for particular items of equipment, and the manner in which services are rendered, will not be highly visible. A citizen in Cleveland is likely to have considerable difficulty determining whether his rights are being violated by practices in a rural school district hundreds of miles distant. The situation is exacerbated by the fact that the direct parties to the transaction by which the First Amendment may be abridged will conspire and cooperate in keeping as low a profile as possible in the rendition of these services. The nonpublic school administrations will do so in self-interest, and the public school authorities will do



so in order to avoid controversy and yield to sectarian pressure.

This pattern is well illustrated by the manner in which SB 170 is now being implemented. After this case was set for argument, appellants approached the Ohio Department of Education in order to determine how funds were being allocated to various programs under the Act, should the question arise during argument. Appellants learned that until long after the funds have been spent, the only centrally collated information is a computer printout indicating the allocation to the school district, and identifying the nonpublic schools to which the aid is directed and their enrollment.[1/] A sample page of this printout is attached to this brief and marked "Appendix A". Any further collation of information at the state level will only occur after the materials are loaned, the services rendered, and the appropriation exhausted. At that point, whatever violations of the First Amendment are involved shall have already occurred and those who object shall face the hapless and arduous task of seeking to recover the funds. Cf. Lemon v. Kurtzman, 411 U.S. 192 (1973) (Lemon II).

In a somewhat comparable situation where victims of constitutional violations often have difficulty discovering the extent of their deprivations, i.e., racial discrimination, it has been necessary to create elaborate investigative agencies such as the EEOC and the state civil rights commissions to ferret out the facts. No

1/ Although defendants urge the benefits are not to the school, significantly, the allocation is ultimately on a school-by-school basis.

such agencies exist to enforce the Establishment Clause, and if they did they might well pose their own problems of entanglement. The only viable means of safeguarding the Establishment Clause is for this Court to continue to strike down laws which do not of themselves ensure against sectarian abuse.

If these laws are to be tested only as applied, under the philosophy that abuse should not be anticipated, the number of lawsuits will proliferate and the issues resolved will be much narrower, for the plaintiffs will have no comfortable choices. They will either have to give up the struggle to preserve church-state separation, or they will have to monitor these programs through the discovery processes of the courts. If the latter event should occur, a new form of unfortunate entanglement will have been engendered -- judicial entanglement. The specter of an endless parade of clerical and educational personnel across the witness stands to testify to their practices is not a comfortable one. [2]/

However, in spite of the inevitable increase in litigation which would be spawned by a deferral of constitutional adjudications in this area, millions of dollars will ineluctably be misspent before constitutional abuses can be corrected. See Lemon v. Kurtzman II, supra. And, the limited

[2]/ The necessity of avoiding the pinning of Establishment Clause adjudications on "variable aspects" so as to prevent "continuing day-to-day relationship" and "confrontations that could escalate" was mentioned in the opinion delivered by the Chief Justice in Walz v. Tax Commission, 397 U.S. 664, 674 (1970).



resources of those who challenge these enactments in the interest of religious liberty will be insufficient to reach every major violation.

For the foregoing reasons, appellants urge this Court not to shrink from exploring the ways in which Ohio's latest program to aid nonpublic education can foster sectarian abuse. Such an analysis must yield the conclusion that the potential for abuse is not materially less than that which caused this Court to strike down the statute challenged in Meek v. Pittenger, supra.

II.

The character of parochial grade school education in Ohio is similar to that involved in previous decisions of this Court.

The District Court found that based upon the stipulated facts, the "character of these [nonpublic] schools is substantially comparable to that of the schools involved in Lemon v. Kurtzman, 403 U.S. 602, 615-18 (1971)" (footnote omitted). Wolman v. Essex, 417 F. Supp. 1113, 1116 (S.D. Ohio 1976). The Grit defendants now urge that in Ohio, "religion is not fused into secular courses" and that "heretofore presumed differences between elementary, secondary and higher education may need reconsideration" (Grit Brief, p. 13). The stipulation only concedes that teachers are not "required" to teach and integrate religious doctrine in secular courses; it

does not concede that secular courses are not flavored by the religious atmosphere of the institution.

An administration of the Establishment Clause which causes the constitutionality of statutory programs around the country to turn upon slight differences in the practices of various sectarian grade schools would be unworkable. These appellees seem to recognize this when they acknowledge that they seek to uphold the statute because of its secularity and not because Ohio schools do not fit a standard profile. Id. at 13, 14.

For the foregoing reasons, it must be concluded that whatever the abstract merit of the appellees' suggestion that the character of sectarian education be reconsidered, the record and the finding below [3]/ render this case a poor vehicle for such reconsideration.

III.

Appellants do not concede that all categories of assistance under the Act are severable.

The Grit defendants state that appellants have conceded "the severability of the various categories of assistance provided under the Ohio Act ..." (Grit Brief, p. 17.) Presumably some degree of

3/ That finding, by a District Court with a feel for the Ohio fact pattern, should not be disturbed unless clearly erroneous. Cf. Bishop v. Wood, 426 U.S. 341 (1976).



concession on this subject can be inferred from appellants' decision not to challenge certain programs authorized by the Act, including medical, dental and nursing diagnostic programs. However, no blanket concession as to the independent viability of every clause of the statute was intended.

In the event that this Court's decision herein results in a situation like that of Meek v. Pittenger where a minor portion of the statutory scheme remains after the major programs are stricken down, it may be appropriate for this Court either to invalidate the entire statute or to remand the consideration of the severability of the residue for further proceedings in the District Court. There may well be a First Amendment problem involved in leaving all of an Eighty-eight million dollar subsidy standing for provision of even a dental service in sectarian institutions.

IV.

Diagnostic services are not limited to the use of standard diagnostic tests.

SB 170 provides, without further definition, for the furnishing, inter alia, of diagnostic speech and hearing services and psychological services. Ohio Rev. Code §3317.06(D) and (F). The Grit defendants argue that these services merely comprise the use of standardized objective tests, citing a publication of the Ohio Department of Education ("The Intern Program in School Psychology" and "Ohio School Speech and Hearing Services", Grit Brief, pp 19-21). However, these defendants hedge their

assertions on this subject by saying that the psychologists "typically" use standardized tests (Id. at 19) and that "[i]n general" the described testing procedure is used (Ibid., quoting from "Ohio School Speech and Hearing Services"). The fact is that SB 170 does not tie these diagnostic services to specific standardized testing procedures. The sources referred to by these defendants prescribe recommended procedures; they do not limit or regulate the procedures which may be employed under the Act. Notwithstanding these references, the scheme of SB 170 relies solely upon the "good faith" of the public personnel dispatched to sectarian sites to refrain from inculcating religion. This is expressly prohibited by Meek v. Pittenger, 421 U.S. 349, at 369 (1975).

V.

> While this court's decision in this case may effectively decide the validity of certain programs which may be employed under Title I of the Federal Elementary and Secondary Education Act, the validity of that Act itself is not at issue in this appeal.

The Grit defendants urge that appellants have suggested that Meek v. Pittenger may have invalidated Title I of the Federal Elementary and Secondary Education Act. (Grit Brief, p. 24). Appellants have not done so. However, in view of the filing of briefs amicus curiae, by the United States and the State of New York, urging that this Court not adjudicate Title I in this case, appellants regard it as appropriate to



address the relationship between this case and Title I.

Obviously the law challenged in the instant appeal is an Ohio statute and not Title I. Appellants seek no judgment concerning the federal statute in this litigation, and are entitled to none. However, the same First Amendment which applies to the states via the Fourteenth Amendment does not change its wording when it applies directly to the federal government. It is difficult to understand how a remedial teacher paid by the state can be prohibited by that Amendment from performing services in a parochial school, but allowed to do so if paid under Title I. It would thus appear inevitable that the alternative methods of meeting Title I's funding condition that "comparable services" be provided to non-public school pupils, as listed in Wheeler v. Barrera, 417 U.S. 402, 425-26 (1974), must be deemed limited by Meek v. Pittenger, supra. In truncated fashion, that is all appellants meant in footnote 28 on page 42 of their brief-in-chief. [4]/

Since Title I does not mandate specific kinds of programs, but merely requires the state and local agencies to devise plans which meet the comparability criteria, it would not appear that this case will have much effect upon the facial validity of Title I. However, insofar as Title I is broad enough to encompass programs like those adjudicated under the Ohio Act here

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[4]/ A similar conclusion is reached in Levin, Between Scylla and Charybdis: Title I's "Comparable Services" Requirements and State and Federal Establishment Clauses, 39 Duke L. J. 39, 56, 65-66 (1976).

challenged, with every respect to Amici, it is difficult to see how the ordinary principles of stare decisis can be avoided.

VI.

Prohibition of therapeutic services except as part of a general program for public and nonpublic school pupils does not involve labeling children "sectarian citizens".

The Grit defendants (while accusing appellants of emotional catchwords (see Grit Brief, p. 12), argue that nonpublic pupils would be labeled "sectarian citizens" by a rule which denies them special services at sites which, though nominally public, are not so used by public school pupils. Id. at 31. To the contrary, it is the very creation of such programs which threatens to denominate a class of sectarian citizens, for making an education center out of a firehouse for the children of only a few faiths would certainly tend to set them apart. These defendants ask "[a]re these children identifiable sectarian children when they go to the movies; when they enter the grocery store [etc.] ..." Id. at 32. (And see State Brief, p. 17). However, they do not go to such places as a group selected by the government as a result of their sectarian affiliation and practices. The way to prevent the creation of a sectarian citizenship is to insist that when pupils enrolled in parochial schools receive governmental benefits, they do so as part of a program administered for all children in a truly public and neutral place: a public school or a facility such



as a public library which is in fact, not merely in tenuous theory, available to the public for that purpose. 5/

VII.

The furnishing of equipment and materials: the lending library analogy proves too much.

The Grit defendants urge that the lending of equipment and materials for use in parochial schools will not advance religion because what is created is merely a lending library, within the church school, where public personnel lend the items directly to the pupil.

> " ... [T]he new Ohio Act very carefully spells out 'a lending library procedure' for dissemination of these materials to pupils. The new Act authorizes publicly-employed and controlled clerical personnel to administer the lending process." Grit Brief, pp. 44-45.

This argument totally undermines any effort of the defendants to minimize the central role of the public personnel who are to administer the equipment and materials program

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5/ An example of the abuse which can occur when adjacent public and parochial facilities are employed in a manner which effectively merges them is illustrated in Moore v. Board of Education, 4 Ohio Misc. 257, 212 N.E.2d 833 (Mercer Common Pleas 1965).

on parochial premises. A "lending librarian" no less than other auxiliary personnel, would be barred from service in a sectarian institution by Meek. For such librarians perform "important educational services ..." 421 U.S. 37. However, no elaborate analysis is necessary to buttress the conclusion that there is something wrong, in Establishment terms, with a state lending library being maintained inside a place of worship or its educational arm.

However, the analogy between the lending library and the equipment and materials loan is also factually inaccurate. As appellants pointed out at length in their brief-in-chief (pp. 21, 31), the list of available materials and equipment includes a large proportion of items which will be loaned to the class as a group (A. 67-71, Exhibit D). These items will simply not be returned to their public custodians until they are worn out or obsolete.

Interestingly, the state defendants who are charged with the administration of the Act, contradict the parental defendants on this point. They admit that they do not contend

> " ... that there is no distinction between textbooks and materials and equipment. The General Assembly obviously felt there was a distinction between these items or it would not have made separate provisions for them in the statute." State Brief, p. 10.

Moreover, while the Grit defendants mention a list of educational devices



ascribed to be usable by individual pupils (Grit Brief, pp. 46, 48) only a few of these items (i.e., tachistoscopes and rotomatics) are mentioned among the stipulated examples of available aid set forth at Exhibit D (A. 67-71). And even if children use these expensive pieces of electronic equipment and devices one at a time, the analogy to the loan of textbooks which a child carries to and from class and often takes home, is far-fetched. The devices to be loaned under this Act are school equipment. But for the perceived need of the defendants to circumvent the First Amendment, no one would think of calling the process of making them available to pupils a "loan to the pupils."

In evident recognition of the impossibility of sustaining SB 170's loan clauses as limited to individual use items, the state defendants argue that "[w]hether or not a piece of instructional material is distributed to an individual pupil ..." should not matter (State Brief, p. 13). However, this line of reasoning would lead to the conclusion that any item which benefits the child is immunized from Establishment Clause attack under the child benefit theory. This conclusion was rejected in Committee for Public Education v. Nyquist, 413 U.S. 756, 785 (1973).

The Grit defendants, quoting from the transcript of testimony in the trial of POAU v. Essex, 28 Ohio St.2d 79 (1971) (which transcript is not a part of the record in this case, see pp. 20-21, infra.), point out that the services and materials provided under the Ohio statute would not otherwise be available (Grit Brief,

pp. 26-27, 49-50). These defendants thereby admit that these items cannot be analogized to transportation and textbooks, which have generally been supplied for parochial pupils, frequently by parents. See Meek v. Pittenger, supra, 421 U.S. at 361 n. 10. Contrary to the State defendants' assertion (State Brief, p. 13), appellants do not agree that supplanting a benefit previously supplied by the parents necessarily makes the beneficiary the child rather than the school. However, where the benefit is an item which, if furnished at all, would be furnished by the institution, the child benefit theory would equally justify total subvention of the parochial education process as Mr. Justice Black warned in Board of Education v. Allen, 392 U.S. 236, 253 (1968). See also, Committee for Public Education v. Nyquist, supra, 413 U.S. at 782 n. 38.

VIII.

Field trip busing fosters excessive entanglement.

The Grit defendants argue that excessive entanglement is avoided under the Act's provision for field trip transportation because the buses are idle during the school day (Grit Brief, p. 53), so that scheduling conflicts will not occur. Even if this unsupported allegation is accepted, in an age of fuel shortages it is unrealistic to suppose that there will be unlimited availability of buses for all public and private schools whenever a field trip is desired, and however long the trip. Competition for available transportation funds would appear inevitable and under the Ohio Act, there



are only two possibilities. If the district transportation coordinator asserts authority to refuse a transportation request, 6/ pressure against such a decision will be applied from sectarian institutions. If the Act is interpreted as requiring him to honor each request for transportation, the unilateral determination of the sectarian school authorities will control the amount of expense incurred by the public for this program. In either instance, potential excessive entanglement is patent.

IX.

Standardized tests are for the use of the school administrations, and not merely for the monitoring of state minimum standards.

The State defendants argue that standardized tests, which are stipulated to "measure the progress of students in secular courses" (A. 48 S. 37), are merely a method of determining whether state minimum curricular standards are being met. Such tests are generally employed by the teachers and staff to evaluate the progress of individual pupils. Parochial schools have been chartered in Ohio for many years without the necessity of the state's paying for their testing programs. And if the state deems it necessary that standardized tests be given in order to maintain licensure, no corresponding obligation is imposed on the state to pay for the tests. See p. 19, infra. Testing remains an integral part of the

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6/ SB 170 does not specify whether he has such discretion.

education process which, in sectarian schools, cannot be publicly funded. See Levitt v. Committee for Public Education, 413 U.S. 472 (1973).

X.

Invalidation of SB 170 will not violate the Free Exercise Clause.

The defendants argue that the government may not deny the auxiliary benefits afforded under this statute to children enrolled in parochial schools without violating the Free Exercise Clause. (Grit Brief, pp. 31-34, State Brief, p. 17). Rejecting a similar argument, the District Court for the Southern District of Ohio noted that the Free Exercise Clause "has never been interpreted as placing an affirmative duty upon the state to appropriate money so that religious beliefs might be more effectively exercised ..." Kosydar v. Wolman, 353 F. Supp. 477 (S.D. Ohio 1972), aff'd sub nom. Grit v. Wolman, 413 U.S. 901 (1973). See also Brusca v. Missouri ex rel. State Board of Education, 332 F. Supp. 275 (E.D. Mo. 1971), aff'd 405 U.S. 1050 (1972). And, "a state could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might be best achieved by withholding all state assistance." Norwood v. Harrison, 413 U.S. 455, 462 (1973).

In short, if it is invalid under Establishment Clause tests, the Ohio enactment cannot be saved by reference to the Free Exercise Clause. The defendants' proposed construction would "for all practical purposes, render meaningless the thrust and



import of the Establishment Clause." Kosydar v. Wolman, supra, 353 F. Supp. at 764.

XI.

Defendants rely upon materials not in the record.

Although the Grit defendants chide appellants for going beyond the record (for example, Grit Brief, p. 11)--when appellants were merely arguing inference from the stipulations concerning the potential of the statute for sectarian abuse--these defendants themselves have sought to enlarge the record by quoting at length from the transcript in POAU v. Essex, 28 Ohio St.2d 79 (1971). As Appellants explained in their "Brief in Opposition to Motion to Dismiss or Affirm and in Opposition to Motion to Affirm" (at pp. 3-4) in their last previous appeal to this Court, Wolman v. Essex, No. 74-339, these appellants were not parties to POAU v. Essex. They had brought their own action against the predecessor statute, and their motions to intervene in or consolidate with the POAU suit were denied, whereupon they dismissed their action without prejudice. Having been denied the opportunity to cross examine the witnesses whom the Grit defendants now quote, they should not be saddled with the burden of rebutting their testimony in another action to which they were not parties, which testimony is not part of the record in this case.

Furthermore, if the record in POAU v. Essex were to be explored, other portions of the testimony should be explored, including

the grudging admissions of Ohio parochial school representatives that sectarian influences invade secular curriculum (for example, Transcript, pp. 134-36). Under ordinary precepts of appellate review, this case should be heard on its own record, and not that of other litigation between other parties.

## Conclusion

The Grit defendants conclude their presentation by referring to "a ten-year history of a remarkably successful auxiliary service program ... which has been implemented without evidence of political divisiveness along religious lines." Appellants do not comment upon the success of the program from an educational standpoint, because that is not what is at issue here. From an Establishment Clause point of view, that ten-year history has been a disaster rather than a success. Until August of 1975, when the current statute was adopted, that program was administered under a statute which was constitutionally indistinguishable from that stricken down in Meek v. Pittenger. Many millions of dollars have thus been expended in violation of appellants' First Amendment rights. Nor has there been a lack of political divisiveness. In Ohio, as elsewhere, groups have formed on both sides of these issues (as evidenced by the amicus participation in this case) who have sought, often bitterly, to impress their points of view upon the legislature and the courts. If the divisiveness has been controlled in any measure, that control has been achieved principally by the decisions of this Court which have preserved separation between church and state. Those



decisions have given proponents of separation reason for patience and hope that divisive political action may yet prove unnecessary; and those decisions have set limits upon what the proponents of full governmental subsidization of religious education may credibly demand.

The words of Mr. Justice Rutledge, dissenting in Everson v. Board of Education, 330 U.S. 1, 53 (1947) remain pertinent:

> "The reasons underlying the [First] Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting."

For the foregoing reasons, appellants respectfully urge this Court to reverse the decision of the District Court.

Respectfully submitted,

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# APPENDIX

REGION SEQUENCE

STATE OF OHIO
DEPARTMENT OF EDUCATION-DIVISION OF SCHOOL FINANCE
AUXILIARY SERVICES MAXIMUM ALLOCATION REPORT 1976-77 AT $174.29 PER PUPIL (ACTUAL FOR FY77)

COLUMBUS CITY S.D. FRANKLIN COUNTY REGION: 06

| | | ADM | MAX ALLOCATION | PUB IRN | NON-PUB IRN |
|---|---|---|---|---|---|
| 0 2502701A06 | CORPUS CHRISTI | 276 | $48,104.04 | 043802 | 057596 |
| 0 2502701A07 | ST FRANCIS DE SALES | 851 | $148,320.79 | 043802 | 053587 |
| 0 2502701A10 | HOLY NAME | 184 | $32,069.36 | 043802 | 057612 |
| 0 2502701A12 | IMMACULATE CONCEPTION | 348 | $60,652.92 | 043802 | 057661 |
| 0 2502701A13 | OUR LADY OF PEACE | 224 | $39,040.96 | 043802 | 057687 |
| 0 2502701A14 | ROSEMONT | 118 | $20,566.22 | 043802 | 053496 |
| 0 2502701A16 | NOTRE DAME | 231 | $40,260.99 | 043802 | 057752 |
| 0 2502701A18 | ST ANTHONY | 273 | $47,581.17 | 043802 | 057786 |
| 0 2502701A19 | ST AUGUSTINE | 262 | $45,663.98 | 043802 | 057802 |
| 0 2502701A20 | ST CATHARINE | 204 | $35,555.16 | 043802 | 057844 |
| 0 2502701A21 | TRINITY | 149 | $25,969.21 | 043802 | 057869 |
| 0 2502701A24 | ST GABRIEL | 212 | $36,949.48 | 043802 | 057893 |
| 0 2502701A25 | ST JAMES THE LESS | 512 | $89,238.48 | 043802 | 057901 |
| 0 2502701A27 | ST JOSEPH ACADEMY | 161 | $28,060.69 | 043802 | 057950 |
| 0 2502701A28 | ST JOSEPH ACADEMY | 95 | $16,557.55 | 043802 | 053710 |
| 0 2502701A29 | ST LADISLAS | 236 | $41,132.44 | 043802 | 057968 |
| 0 2502701A30 | ST LEO | 199 | $34,683.71 | 043802 | 057976 |
| 0 2502701A31 | ST MARY | 211 | $36,775.19 | 043802 | 058008 |
| 0 2502701A32 | ST MARY MAGDALENE | 357 | $62,221.53 | 043802 | 058057 |
| 0 2502701A33 | ST MATTHIAS | 256 | $44,618.24 | 043802 | 058073 |

A1

No. 76-496

# In the Supreme Court of the United States

OCTOBER TERM, 1976

BENSON A. WOLMAN, ET AL., APPELLANTS

*v.*

MARTIN W. ESSEX, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO*

## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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**MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE**

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## INTEREST OF THE UNITED STATES

This case presents questions concerning, among other things, the provision of educational services to students of private religiously-affiliated schools, but off the premises of those schools. The Ohio statutes at issue here have features in common with programs established under Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27 *et seq.*, as amended, 20 U.S.C. (and Supp. V) 241a-241o. Designed to carry out the policy of the United States to improve the quality of education in this country, Title I provides financial assistance to local education agencies serving areas with high concentrations of children from low income families. Because the adverse educational effects of poverty are

not limited to children in public schools, but also afflict children in private schools, Title I and its implementing regulations provide that the assistance should benefit both categories of children with comparable programs.

The United States Office of Education, which administers programs under Title I, informs us that in fiscal year 1977 approximately $2.05 billion was appropriated to support Title I, and that grants were made to approximately 14,000 school systems. The United States is concerned that, to the extent the Ohio programs may be similar to those funded under Title I, the Court's decision here could have a substantial effect upon the constitutionality and administration of Title I.

**DISCUSSION**

The Court described and discussed Title I in *Wheeler* v. *Barrera*, 417 U.S. 402. As the Court pointed out in *Wheeler*, "the legislative aim was to provide needed assistance to educationally deprived *children* rather than to specific schools, [and it therefore] was necessary to include eligible private school children among the beneficiaries of the Act" (417 U.S. at 406; footnote omitted; emphasis in original).

Title I provides funds to local educational agencies to meet the needs of educationally-deprived children in school attendance areas having high concentrations of children from low-income families (20 U.S.C. (Supp. V) 241e(a)(1)). An "educationally deprived child" is defined by the regulations of the United States Commissioner of Education as one who needs special educational assistance to raise his level of educational attainment to that appropriate for a child of his age (45 C.F.R. 116a. 2).

The Commissioner allocates the funds to the States. State educational agencies, in turn, distribute the funds to local



educational agencies under a statutory formula based on the number of children from low-income families in each school district (20 U.S.C. (Supp. V) 241c(a)(2)). In order to obtain funds, a local educational agency must submit a written application to the state educational agency proposing a project to meet the special educational needs of educationally deprived children. State agencies are authorized to approve any program, consistent with criteria prescribed by the Commissioner, that gives "reasonable promise" of meeting the needs of such children (20 U.S.C. (Supp. V) 241e(a)(1)).

The congressional declaration of policy in Title I (20 U.S.C. 241a) states that "[i]n recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs," it is "the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children."

Title I authorizes financial assistance only for special programs, such as remedial reading and mathematics classes, that are designed to meet the needs of educationally deprived children. To ensure that other expenditures are not reduced upon the receipt of federal funds, the Act states that the funds will be used "to supplement and, to the extent practical, increase the level of funds that would * * * be made available from non-Federal sources * * * " (20 U.S.C. 241e(a)(3)(B)(i)), and

"in no case [will Federal funds be used] * * * to supplant such funds from non-Federal sources" (20 U.S.C. 241e(a)(3)(B)(ii)).

The statute requires that a local agency must provide services under Title I programs to disadvantaged children enrolled in both public and private schools.[1] The Act provides that a public agency must retain "control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency * * * and that a public agency will administer such funds and property." 20 U.S.C. 241e(a)(3)(A). Local agencies furnishing such services to private school children are subject to the regulations established by the Commissioner of Education, which provide that the services furnished with Title I funds must always remain under the administrative direction and control of a public agency and may not be administered by the private school. 45 C.F.R. 116a.23(f), 116.42. No Title I funds may be used for religious worship or instruction. 20 U.S.C. 885.

In accordance with the Commissioner's regulations (45 C.F.R. 116a.23), all Title I programs are operated by public education agencies, and all persons performing services under those programs do so as employees of the public agencies.

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[1]The statute permits the state educational agency to make a grant to a local educational agency only upon its determination that, among other things, "[t]o the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, * * * [such agency has made] provisions for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate * * * " (20 U.S.C. (Supp. V) 241c-1(a) and 241e(a)(2)).



Title I is sufficiently flexible to allow local agencies to observe, where possible, state and local restrictions upon aid to private school children (*e.g.*, prohibition against dual enrollment). See *Wheeler* v. *Barrera, supra*. Accordingly, Title I programs may be provided in a different manner to private and to public school children. In addition, the content of the services could differ if the "special educational needs" required to be met under 20 U.S.C. (Supp. V) 241e(a)(1)(A) of the two groups differ. The Commissioner of Education, however, has sought to assure that the different forms in which the services may be furnished to the two categories of children provide equally a reasonable promise of meeting the needs of the children, by requiring that the services supplied to private school children "must be comparable in quality, scope, and opportunity for participation to those provided to public school children with needs of equally high priority" (45 C.F.R. 116a.23(c)).

In sum, Title I accomplishes its goal of augmenting the educational opportunities of children by providing intensive services, such as remedial reading programs, to all eligible children within the geographic area covered by a grant. Sometimes this involves, as in *Wheeler*, sending a teacher to a private school; sometimes it involves allowing private school students to attend sessions in public schools; sometimes students of both public and private schools attend sessions at a third location.

The Ohio program at issue in this case, like Title I, provides services to students enrolled in private schools, many of which are sectarian. To the extent these services are provided by public employees off the premises of the sectarian schools, they offer significantly less opportunity for "entanglement" of church and state than do on-premises services. Cf. *Meek* v. *Pittenger*, 421 U.S. 349. Off-premises

services provided by public employees do not require the State to monitor the classrooms of sectarian schools, do not require policing to ensure that public funds are not used for sectarian purposes (since the sectarian schools do not receive public funds), and do not require any visits by public employees to the sectarian schools. Accordingly, the provision of such off-premises services is not subject to the same constitutional difficulties as the provision of services on the premises of the sectarian schools. See *Wheeler* v. *Barrera, supra,* 417 U.S. at 428 (Powell, J., concurring).

But however that may be, we submit that Title I is fundamentally different from all state and local programs that offer aid to sectarian schools. The federal government has extended aid to individual children, without regard to the schools the children attend. Although a State may fulfill its duty of neutrality by opening the doors of its public schools to all children, the United States does not maintain a system of public schools, and, therefore, to offer a program that is neutral with respect to religion, the United States must make its benefits available to students in public and private schools alike.

The constitutionality of some Title I services (those provided on the premises of private schools) is the subject of a pending suit in which a comprehensive record is being compiled. *National Coalition for Public Education and Religious Liberty* v. *Califano,* S.D. N.Y., No. 76-888, filed February 25, 1976. The parties will endeavor to develop fully the extent, if any, of interference and entanglement with religion that may be caused by Title I. Because "[t]he task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one * * * [ . u]sually * * * requir[ing] a careful evalua-



tion of the facts of the paricular case" (*Wheeler* v. *Barrera, supra,* 417 U.S. at 426), the United States believes that the Court's decision in this case will not necessarily affect the constitutionality of Title I. Nevertheless, so that the Court will be aware of some of the considerations that support the constitutionality of Title I (and, to the extent they are similar to Title I, the Ohio programs), we have attached as an appendix to this memorandum the portion of our brief in *Wheeler* addressing the constitutionality of Title I.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

APRIL 1977.

## APPENDIX*

### A. TITLE I IS A RELIGIOUSLY NEUTRAL STATUTE THAT PROVIDES EDUCATIONAL BENEFITS COMPARABLE IN FORM AND SCOPE TO THOSE THAT THIS COURT HAS UPHELD UNDER THE ESTABLISHMENT CLAUSE.

The present statute, unlike the legislation aiding religiously-affiliated schools which this Court has recently invalidated (see *Lemon* v. *Kurtzman*, [403 U.S. 602]; *Levitt* v. *Committee for Public Education & Religious Liberty*, [413 U.S. 472]; *Committee for Public Education & Religious Liberty* v. *Nyquist*, [413 U.S. 756]; and *Sloan* v. *Lemon*, [413 U.S. 825]), was not designed primarily to provide financial assistance to private schools. Its purpose was to enable local educational authorities to meet "the special educational needs of educationally deprived children" (20 U.S.C. 241a), no matter what schools they attend. * * * Fewer than [5] percent of the children in this country who received Title I aid in fiscal year [1976] were enrolled in private schools. * * *

In constrast, the two State aid programs struck down in the *Lemon* case were specifically designed to alleviate the financial situation of the State's non-public schools and provided benefits only to those schools. *Lemon, supra,* 403 U.S. at 606-607, 609; *Sloan, supra,* [413 U.S. at 826-827]. Similarly, the New York programs which this Court invalidated * * * in *Levitt* and *Nyquist*

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*This Appendix is reprinted from pages 28-36 of the Brief for the United States as *amicus curiae* in *Wheeler* v. *Barrera*, No. 73-62, October Term, 1973. We have made editorial changes to reflect new data on Title I and to eliminate references to the positions of the parties in *Wheeler*.

involved various forms of financial aid given solely to non-public schools.

The form and scope of the educational benefits provided under Title I are comparable to those which this Court has upheld against challenges under the Establishment Clause in such cases as *Everson* v. *Board of Education,* 330 U.S. 1, where the State reimbursed parents for bus fares paid for transporting students to public and private schools; *Board of Education* v. *Allen,* 392 U.S. 236, involving a State plan under which public school authorities lent text books without charge to all students of the State, including those attending private schools, and in which the Court cited with approval its prior statement in *Everson* (330 U.S. at 16-17) that "the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation" (392 U.S. at 242); and *Tilton* v. *Richardson,* 403 U.S. 672, where the Court upheld the constitutionality of the Federal Higher Education Facilities Act of 1963, under which federal grants were made to colleges and universities, including religiously-affiliated ones, for the construction of facilities to be used for secular educational purposes.

Like the programs upheld in those cases, the Title I program is religiously neutral. It provides remedial educational services for all educationally deprived children, no matter which schools they attend. It is not designed to aid private schools. Indeed, since the remedial educational services to be provided under Title I are required to be supplementary to those "made available from non-Federal sources" (20 U.S.C. 241e(a)(3)(B)(i))—*i.e.,* they must be in addition to those the schools normally provide—Title I may fairly be viewed as not providing any



aid to the religiously-affiliated schools in their normal operations. To whatever extent Title I does provide government aid to religiously-affiliated schools, therefore, the aid is at most indirect and peripheral. It is a far cry from the types of government assistance to religiously-affiliated schools that this Court has previously invalidated under the Establishment Clause.

### B. TITLE I MEETS THE CRITERIA THIS COURT HAS APPLIED FOR DETERMINING WHETHER A STATUTE SATISFIES THE ESTABLISHMENT CLAUSE.

In *Committee for Public Education* v. *Nyquist, supra,* the Court summarized the "well defined three-part test that has emerged from our decisions" [413 U.S. at 772] that, "to pass muster under the Establishment Clause," a statute

> first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion [413 U.S. at 773, citations omitted].

Title I satisfies all three of these criteria.

1. *Title I Has a Clearly Secular Purpose.*

* * * Title I has a secular purpose. * * * [T]he aim of Congress was to provide important remedial educational services to all educationally deprived children without regard to whether they attend public or private schools. The objective was not to aid religiously-affiliated schools but to help educationally deprived children regardless of the schools they attend.

2. *Title I neither Advances nor Inhibits Religion.*

* * * Title I is religiously neutral. It provides remedial educational services to all children, including those attending private schools. No governmental funds are given to the private schools or used to pay teachers for conducting regular instruction in those schools. The educational services provided supplement the regular curriculum, and are performed exclusively by employees of the public educational agencies.

There is nothing in the Title I program that furthers or aids the private schools in conducting the religious aspects of their educational programs, or inhibits them from doing so. Although the provision of Title I remedial services on the premises of religiously-affiliated schools could make those schools more attractive to the parents of children attending them, that collateral benefit is "not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment" (*Board of Education* v. *Allen, supra,* 392 U.S. at 242; see, also, *Everson* v. *Board of Education, supra,* 330 U.S. at 17-18).

[It might be argued] that Title I and the Commissioner's regulations constitute a prohibited support of religion because they contain no effective safeguards to insure that the public school teachers will not utilize the remedial educational instruction as a vehicle for inculcating religious beliefs. This possibility is so unlikely and remote that it affords no basis for concluding that the Title I program constitutes government support of religion.

* * * [T]he Title I programs are formulated, administered and operated by the public educational agencies. The teachers providing the services, no matter where they do so, are employed by and under the complete control of the



public agencies. Accordingly, there is not here present the "potential for conflict" that concerned this Court in *Levitt* v. *Committee for Public Education & Religious Liberty,* [*supra,* 413 U.S. at 480], which struck down a New York statute providing grants to religious schools to prepare State-required examinations. There the Court noted (*ibid.*) "the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." See *Lemon* v. *Kurtzman, supra,* 403 U.S. at 617, where this Court spoke of "the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education."

[Under Title I], in contrast, the religiously-affiliated schools would have no control over either the content of the special remedial instruction or the way in which the instruction were given. [Even when the educational services were offered on the premises of the sectarian school, those] determinations would be made by the public educational authorities solely on the basis of the secular standards provided in Title I and the Commissioner's regulations * * * . The public school teachers providing the services would not be subject to the authority and discipline of the people running the religiously-affiliated schools, but only to the control of the public agencies which hire, pay and direct them. As Mr. Justice Brennan pointed out, in explaining his vote to deny certiorari in *Nebraska State Board of Education* v. *School District of Hartington,* 409 U.S. 921, where the lower court had upheld the provision of Title I remedial reading and

remedial mathematics services to both public and private school students upon premises the school district had leased from a Catholic school:

> [T]he school district would have no part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise. The remedial reading and remedial mathematics courses would operate completely independently of that curriculum and of the Catholic school administration [*id.* at 926].

3. *Title I Involves No Excessive Government Entanglement with Religion.*

The basic character of the Title I programs— under which employees of local educational authorities working under the control and supervision of those authorities provide supplementary remedial educational services to educationally deprived children pursuant to plans formulated and administered by the public authorities—insures that the programs will not involve excessive government entanglement with religion.

* * * *Lemon* v. *Kurtzman, supra* [, is not to the contrary]. There this Court invalidated two State plans for providing financial aid to private schools, because they involved excessive government entanglement with religion. The aspects of those plans which constituted such entanglement, however, are not present in the Title I programs.

The two State plans struck down in those cases involved direct State grants (1) to private schools for the costs of teaching secular subjects and (2) to teachers of secular subjects in those schools. The administration and control of the teaching and the content of the secular courses were under the direct supervision and



control of the religiously-affiliated schools. In those circumstances, as the Court noted, the States inevitably would be required to conduct "comprehensive, discriminating, and continuing surveillance" of the schools to assure that the secular purposes of the financial aid were observed (403 U.S. at 619).

In contrast, there would be no occasion for such public surveillance of private schools in connection with the operation of Title I programs. Those programs require no distinction to be made between secular and sectarian subjects, and are conducted by employees of public educational agencies under the complete control of those agencies.[9]

There is similarly no likelihood that providing Title I services on private school premises would create the serious potential for political divisiveness that also concerned the Court in *Lemon* (403 U.S. at 622-624). The State plans there involved annual legislative appropriations "that benefit relatively few religious groups" and that were thus likely to intensify "[p]olitical fragmentation and divisiveness on religious lines" (*id.* at 623). The Court distinguished (*ibid.*) *Walz* v. *Tax Commission,* 397 U.S. 664, which upheld state tax exemptions for real property owned by religious organizations and used for religious worship, on the ground that that decision "dealt with a status under state tax laws for the benefit of all religious groups," where the like-

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[9]Of course, there will be circumstances in which the public educational authorities will review the performance of Title I teachers who provide services on private school premises. But the purpose would not be * * * to determine whether the teachers are fostering religion, but whether they are teaching effectively. This review would be required whether particular teachers teach in public or private schools, or in both.

lihood of such "[p]olitical fragmentation and divisiveness" was much less.

* * * [U]nlike the State plans involved in *Lemon*, [Title I] is not designed to benefit religiously-affiliated schools at all, and whatever benefit it may give them is collateral and incidental. Only about [4.7] percent of the children who would receive benefits under Title I attend private schools. "[I]n terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor" (*Nyquist, supra*, [413 U.S. at 794]). In the present case, as in *Allen* and *Everson*, "the class of beneficiaries included *all* school children, those in public as well as those in private schools" (*id.* at [782], n. 38, emphasis in original). Here as in those cases, there is not sufficient potential for creating divisiveness to constitute a prohibited governmental entanglement with religion.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-496

BENSON A. WOLMAN, FREDRICK CHAMBERS, PATRICIA J. KEENAN, BARBARA KAYE BESSER, NANCY R. TERJESEN, and MARJORIE WRIGHT,
Appellants,
v.
MARTIN W. ESSEX, Superintendent of Public Instruction of the State of Ohio; STATE BOARD OF EDUCATION; GERTRUDE W. DONAHEY,

(Additional title appears on next page)

On Appeal from a Three Judge United States District Court for the Southern District of Ohio Eastern Division

# BRIEF OF THE CITY OF NEW YORK AMICUS CURIAE

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Appellees.

INDEX



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

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Appellants,

-against-

MARTIN W. ESSEX, Superintendent of Public Instruction of the State of Ohio; STATE BOARD OF EDUCATION; GERTRUDE W. DONAHEY, Treasurer of the State of Ohio; THOMAS E. FERGUSON, Auditor of the State of Ohio; BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF COLUMBUS, OHIO; HANNA FEIGENBAUM, JAMES GRIT, EWALD KANE and HELEN S. KOLOSKI,

Appellees.

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On Appeal from a Three Judge United States District Court for the Southern District of Ohio Eastern Division

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# BRIEF OF THE CITY OF NEW YORK AMICUS CURIAE

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## Statement

This brief is submitted pursuant to

Supreme Court Rule 42 (4) on behalf of New

York City as amicus curiae in this case.

## Interest of the Amicus Curiae

(1)

Initially, New York City's interest in this case arises from the fact that Irving Anker, Chancellor of the Board of Education of the City of New York, is a defendant in a case now pending in the United States District Court for the Southern District of New York in which Chancellor Anker's method of implementing Title I of the Elementary and Secondary Education Act of 1965 (Publ. L. No. 89-10; codified as amended, 20 U.S.C. §241 a et seq.; hereinafter referred to as Title I) is being challenged. National Coalition of for Public Education and Religious Liberty, et al. v. Califano, et al., 76 Civ. 888 (CET).*

*A three-judge district court has been convened pursuant to order of Judge Tenney dated February 1, 1977.



Specifically at issue in the National Coalition case are Chancellor Anker's use of Title I funds to finance the assignment of public school teachers to perform compensatory educational services within religiously affiliated nonpublic schools during regular school hours and the regulations of the United States Office of Education issued pursuant to Title I and Title I itself insofar as they are deemed to authorize Chancellor Anker's above described use of Title I funds. Some aspects of Chancellor Anker's described use of Title I funds resemble features of Section 3317.06 of the Ohio Revised Code, the Ohio aid program challenged in this case. New York City is thus concerned that no decision be rendered in this case in such a fashion as to bring, or arguably bring, Chancellor Anker's practices under Title I within its purview.

It is requested that this Court reserve for the National Coalition case the question of the constitutionality of Chancellor Anker's practices under Title I. When that case reaches this Court, and only at such time, will there be the thoroughly developed factual record and the sharp definition of issues which result from a full-fledged adversary proceeding and which are appropriate and necessary for such a decision.

(2)

Title I is targeted to aid educationally deprived children who come from areas with high concentrations of low-income families. New York City's interest in the benefits of this program, and hence its continued constitutional viability, is based on a number of considerations.

In New York City, Title I services consist of corrective reading, corrective



mathematics, English as a second language, clinical and guidance services and special services for handicapped children. This year there are approximately 165,035 children in the New York City School District participating in Title I programs*. The total eligible population is 429,878.** These figures constitute approximately 12% and 31% of the total number of students registered in elementary and secondary schools, respectively.

Clearly it is essential to New York City that all students - whether they be from public or nonpublic schools - who emerge into its population obtain the full benefits of a basic elementary and secondary

*Approximately 152,523 are enrolled in public schools and 12,512 in nonpublic schools.

**395,901 are from public schools, and 33,977 from nonpublic schools.

education - i.e., essential language, reading and math skills. These skills are often determinative of an ability to effectively participate in the economy and social life of the City.

Additionally, those students who benefit from Title I programs are better equipped to take advantage of and contribute to the opportunities for higher education offered by the City University of New York, an institution open to all New York City resident secondary school graduates. If a student has benefited from the remedial services offered by Title I programs, he is less likely to require remedial education at City University; and the University is thereby relieved of the burden of providing such education.

Finally, just as New York City benefits from an effectively educated popu-



lation, it bears the costs of an educationally disadvantaged one. Educationally deprived students are most likely to become or remain victims of poverty - a tenacious condition the human, social and economic costs of which are too well known to bear repetition here. In addition, it is often the educationally handicapped and impoverished young people who resort to the delinquent and other anti-social behavior claiming so much of this City's attention. The City is vitally concerned that Title I remedial educational programs not be diminished or impaired in any manner.

(3)

In addition to the interest in the level of educational attainment of its population generally, New York City has two, more specific, interests in Title I. In order to qualify for Title I participation,

the New York City school district is required to "provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools ... ." 20 U.S.C. §241e-1(b)(2) (emphasis added). The regulations of the Commissioner of Education provide that "[E]ducationally deprived children [in nonpublic schools] shall be provided with genuine opportunities to participate" in Title I services. 45 C.F.R. §116a.23(a), as amended by 41 Fed. Reg. 42894 (Sept. 28, 1976) (emphasis added).

New York City has special insight into the matter of providing "genuine opportunities" for Title I participation by nonpublic school students. During its first year of implementation, New York City provided Title I services solely in after-



school and evening sessions on public school premises. Participation by nonpublic school students was minimal. The next year services were provided in part on nonpublic school premises and in part on public school premises. Significant participation by nonpublic school students was achieved only for those programs offered on the premises of the nonpublic school. New York City has thus found that the most and virtually only genuine opportunity for participation in Title I services by nonpublic school students occurs when those services are offered on the premises of the nonpublic schools.

Any other method of implementing Title I for nonpublic school students, in addition to lessening the effectiveness of the program, would raise substantial problems for New York City. Provision

of Title I services for nonpublic school students on off-school premises would very likely require transporting many students, with attendant safety considerations and added costs. If such services are provided after regular school hours,* this will raise an additional safety problem.

An additional problem for the City which would be posed by termination of Title I services at nonpublic schools is the likelihood that substantial numbers of parents of children needing such services would enroll their children in the public schools even though they would have otherwise preferred to enroll them in a nonpublic school. This would add a tremendous burden to an already financially

*Article XI, Section 3, of the New York State Constitution has been interpreted to prohibit dual enrollment, i.e., the use of public school facilities by nonpublic school students during regular school hours.



strapped public school system.

Additional energy, or fuel, consumption is yet another factor involved in the matter of transportation to and use of off-nonpublic school premises for Title I services. No large City today can embark on any program without heed to restraints imposed by overburdened municipal services, the need for fuel conservation and pressing regard for public safety. These restraints must be factored into any consideration of alternate methods of providing Title I services to nonpublic school children. One cannot help but surmise, however, that the greatest loss New York City faces is the loss of the most effective remedial help possible for the greatest number of Title I eligible students - i.e., educationally deprived children from low income neighborhoods - should its present program be cast

in constitutional jeopardy by a decision in this case.

New York City's special interest in the question of the constitutionality of the Title I program for nonpublic school students arises from its 11 year experience with the present on-premises program. We welcome the opportunity presented in the National Coalition case of demonstrating to this Court that the more than decade long history of this program is free from breaches or cracks in the constitutional wall separating church and state. For these reasons, as well as the legal reasons set forth below, we urge the Court to explicitly reserve the question of the constitutionality of New York's Title I program in any decision it reaches in this case.



## ARGUMENT

### THE CONSTITUTIONALITY OF TITLE I SHOULD BE EXPLICITLY RESERVED.

This case, as is evident from the record below, raises a question of the constitutionality of an Ohio program providing secular services and materials to nonpublic school children. The decision in this case should address itself solely to the constitutionality of the challenged Ohio program.

The appellants, in a footnote in their brief, question the constitutionality of on-premises Title I services in nonpublic schools. This obscure reference should be totally ignored in the decision of this case. Title I is not properly before the Court at this time and this case should provide no occasion for judgment of Title I. This position is consistent with and man-

dated by previous decisions of this Court. Specifically, it was on these grounds that this Court refused to reach the question of the constitutionality of on-premises Title I services when it arose in Wheeler v. Barrera, 417 U.S. 402 (1974). That ruling is thus dispositive in this case and is quoted in full.

> "The second major issue is whether the Establishment Clause of the First Amendment prohibits Missouri from sending public school teachers paid with Title I funds into parochial schools to teach remedial courses. The Court of Appeals declined to pass on this significant issue, noting that since no order had been entered requiring on-the-premises parochial school instruction, the matter was not ripe for review. We agree. . . . [E]ven if, on remand, the state and local agencies do exercise their discretion in favor of such instruction, the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated. For example, a program whereby a former parochial school teacher is paid with Title



I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week. At this time, we intimate no view as to the Establishment Clause effect of any particular program.

> The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. See, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971), and Tilton v. Richardson, 403 U.S. 672 (1971). It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to render a decision on hypothetical facts, and the Court of Appeals was correct in so concluding." 417 U.S. at 426-27 (emphasis added).

For other First Amendment cases in which this Court has reserved on issues not explicitly and necessarily raised see also Committee for Public Education and Religious

Liberty v. Nyquist, 413 U.S. 756 (1973) and Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976).

## CONCLUSION

In the decision of this case, this Court should explicitly reserve the question of the constitutionality of Title I.

March 25, 1977

Respectfully submitted,

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IN THE

# Supreme Court of the United States

**October Term, 1976**

**No. 76-496**

BENSON A. WOLMAN, *et al.*,
*Appellants,*

*v.*

MARTIN W. ESSEX, *et al.*,
*Appellees.*

**On Appeal from the United States District Court for the Southern District of Ohio**

## BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, *AMICUS CURIAE*

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**On Appeal from the United States District Court for the Southern District of Ohio**

## BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, *AMICUS CURIAE*

### Interest of the *Amicus*

B'Nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, and represents a membership of more than 400,000 men and women and their families. The Anti-Defamation League of B'Nai B'rith was organized in 1913 as a section of the parent organization to advance good will and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is dedicated to upholding both the separation of church and state called for in the Establishment Clause, and the right to free exercise of religion, both of which are nothing more than the two

sides of that principle of religious liberty upon which our Republic was founded.

In support of these principles, this *amicus* has previously filed briefs in this Court in such cases as *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), *Sherbert* v. *Verner*, 374 U.S. 399 (1963), *Board of Education* v. *Allen*, 392 U.S. 236 (1968), *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), *Lemon* v. *Sloan*, 413 U.S. 825 (1973), *Meek* v. *Pittenger*, 421 U.S. 349 (1975), *Parker Seal Company* v. *Cummins*, —— U.S. —— (1976), and *Trans World Airlines, Inc.* v. *Hardison*, now pending before this Court.

## Summary of Argument

This brief rests on two general principles: the continued support of the Anti-Defamation League for the First Amendment principle of separation of church and state in the manner which effectively avoids the type of entanglement and strain which inevitably results from state aid to church-sponsored schools, and the belief that efforts to circumvent the separation principle such as those now before this Court should not be permitted for they go beyond the conduct allowed under the standard in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and fall within the prohibited type of state support to parochial schools as exemplified by *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

Applying the now familiar three part test to judge the constitutionality of statutes which provide state aid to church-related activities, the materials and services provided by the Ohio statute, with some exceptions, violate



the restrictions of the Establishment Clause. The exceptions are noted below.

The provision of instructional materials and equipment clearly violates the Establishment Clause, even though the statute now purports to have the State lend those materials to the students, rather than to the non-public schools which they attend. That distinction between this case and *Meek* v. *Pittenger*, 421 U.S. 349 (1975) makes no substantive difference in terms of constitutional permissibility. The Ohio statutory scheme has in fact the same "impermissible primary effect of advancing religion" as did the arrangements in *Meek*, *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), and *Sloan* v. *Lemon*, 413 U.S. 825 (1973).

Of the other services provided by the Ohio statute at public expense, we submit that (1) guidance and counseling services and tests and scoring services may not be provided either on or off public school premises by the State since they deal essentially with the educational function of the schools and present very clear potential for the type of entanglement described in *Lemon;* (2) speech and hearing diagnostic services and diagnostic psychological services are also involved in the educational process and thus contain the same danger of entanglement if furnished on the premises of non-public schools; and (3) those speech and hearing diagnostic services as well as therapeutic psychological, speech and hearing services, and services for the physically handicapped may be provided at state expense with appropriate safeguards to non-public school students without violating the Establishment Clause but only if provided in public centers, or on public school or other public premises, as part of a general program in those areas by public personnel.

Certain types of health care services such as inoculations and X-ray diagnosis which do not involve a potential for entanglement of the State in the educational process may be provided even on parochial school grounds if they are a part of a general program of state provided health care and do not constitute a subsidy, e.g. provision of a full-time doctor.

## ARGUMENT

### Introduction

The Anti-Defamation League of B'nai B'rith [ADL], has based its position in this difficult area of church-state relationships on the political principle contained in the Establishment and Free Exercise clauses of the First Amendment. This guiding principle has been expressed in any number of ways, but none has improved upon Thomas Jefferson's formulation, in replying to an address of the Danbury Baptists Association.

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with solemn reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.[1]

1. Quoted in Pfeffer, Leo, Church, State and Freedom, Boston, The Beacon Press, 1953, p. 119. See also *Everson* v. *Board of Education*, 330 U.S. 1, 15-16 (1947).



It is the idea of a *wall of separation*, first put in those terms by Jefferson, which is the basis for the views expressed in this brief, for the ADL, itself a religiously-based organization, believes that history has vindicated the view expressed by the Founding Fathers, particularly Jefferson and Madison, that a wall of separation effectively protects the church and the state from each other,[2] and that such a wall was an essential element in the constitutional scheme of a government of limited powers. This Court's decisions in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), and *Meek* v. *Pittenger*, 421 U.S. 349 (1975), correctly interpreted the Establishment Clause and have drawn a line which is sufficiently bright to forestall further breaches of the wall of separation in the area of state-support of elementary and secondary school education.[3]

We submit that distinctions can be properly drawn between *Allen* on the one hand and *Lemon*, *Nyquist* and *Meek* on the other, which will allow non-public school students to enjoy certain services and benefits that are generally available to public school students, without further breaching the wall of separation. The distinction which we draw, and which we urge upon the Court, is be-

2. See Pfeffer, *op.cit.*, chapters 1-5.

3. To the extent that *Board of Education* v. *Allen*, 392 U.S. 236 (1968) permitted the free loan of textbooks to parochial school students without a showing of the underlying facts, we contniue to disagree with that determination. We believe that in an appropriate case, as in *Dickman* v. *School District*, 232 Ore. 238, 366 P.2d 533 (Ore. Sup. Ct. 1960), cert. denied, 371 U.S. 823 (1962), the factual showing to support a determination of unconstitutionality could be established. However, the aid package here must be viewed as a whole (see *Meek* v. *Pittenger*, *supra* at 364-66), and the issues of entanglement and primary purpose must be assessed in light of the entire Ohio statute.

tween those state-supported benefits which involve the educational function of the parochial schools, and those which are unrelated to that function, which primarily serve the health and welfare of the parochial school pupils, which are made generally available to students in all public and private schools, and which are furnished off the premises of the non-public schools. In the case of pure health services such as innoculations or X-ray screening, there is no danger of entanglement and they may therefore be furnished in the parochial schools themselves. Others, such as the variety of diagnostic and therapeutic services provided by the statute before the Court, are so close to the educational stream, that they present clear constitutional problems when performed in the parochial schools, but may under certain conditions not violate the Establishment Clause when furnished as part of a general program on public premises. Still other services, such as the provision of instructional materials and equipment, are so integrated into the educational function as to be clearly prohibited. And guidance and counseling services cannot be provided even on public premises because of the great danger of involvement in the educational role of the parochial schools.

Under the terms of O. R. C. §3317.06, five categories of materials or services are to be provided to non-public schools or their students from public funds:

1. Instructional materials and equipment [§§3317.06 (B) & (C)];
2. Speech, hearing, and psychological diagnostic services to be furnished on the premises of the non-public school [§§3317.06(D) & (F)];



3. Speech, hearing, and psychological therapeutic services, guidance and counseling services, and remedial services for blind, deaf, emotionally disturbed, crippled and physically handicapped children to be furnished off the premises of the non-public school in "public schools, in public centers, or in mobile units located off of the non-public school premises . . ." [§§3317.06(G)(H)(I) & (K)];
4. Standardised testing and scoring services to be furnished on the premises of the non-public school [§3317.06(J)]; and
5. Field trip transportation [§3317.06(L)][4].

It is the ADL's position that the Ohio statute must be held unconstitutional in large part because in many respects it authorizes the expenditure of public funds for forbidden educational services within parochial schools. Other provisions of the statute which extend non-educational benefits to parochial school students can survive constitutional scrutiny if they meet certain conditions concerning the place at which and the manner in which they are furnished.

### 1. The Test to be Applied

As most recently stated in *Meek* v. *Pittenger, supra* at 358, the now familiar constitutional test for statutes challenged under the Establishment Clause consists of three elements: the statute must have a secular legislative purpose; it must have a "primary effect" that neither ad-

4. Section 3317.06(A) also authorizes the state to lend textbooks to pupils. While we oppose this provision, we rely upon appellants' argument on the point. See note 3, *supra*.

vances nor inhibits religion; and the statute and its administration must avoid excessive government entanglement with religion.[5]

The Pennsylvania statute at stake in *Meek,* in addition to free textbook loans to students, provided for the supply at public expense of various instructional materials and equipment, and diagnostic and therapeutic services to non-public schools. The materials, equipment and services were, with some minor and irrelevant differences, essentially the same as those to be supplied in this case.[6] The difference in the statutory scheme, seen as significant by the State of Ohio, is that the Pennsylvania statute spoke of lending the instructional materials to the schools rather than to the pupils; and all of the auxiliary services in Pennsylvania were to be performed on the premises of the non-public schools, though by employees of the public school system.

The Court in *Meek* struck down the loan of instructional material and equipment to the schools on the ground that that scheme had the "unconstitutional primary effect of advancing religion because of the predominantly religious

5. Our argument proceeds, of course, from the common premise that, as found by the court below, "the character of these [Ohio non-public] schools is substantially comparable to that of the schools involved in *Lemon* v. *Kurtzman,* 403 U.S. 602, 615-18 (1971)" (J.S. p. A8).

6. The services under the Pennsylvania statute included "counseling, testing and psychological services, speech and hearing therapy, teaching and related services for exceptional students, for remedial students and for the educationally disadvantaged, and such other secular, neutral, non-ideological services as are of benefit to non-public school children and are presently or hereafter provided for public school children of the Commonwealth." 421 U.S. at 353.

The materials and equipment included periodicals, photographs, maps, charts, sound recordings, films and projection, recording and laboratory equipment. *Id.* at 355.



character of the schools benefiting from the Act." 421 U.S. at 363. Describing the aid as "massive,"[7] the Court held that it was "neither indirect nor incidental." Id. at 365. And the Court struck down the provision of all the auxiliary services on the ground that "excessive entanglement would be required for Pennsylvania to be 'certain,' as it must be, that Act 194 personnel do not advance the religious mission of the church-related schools in which they serve." Id. at 370.

**2. Instructional Materials and Equipment**

The fact that the Ohio statute provides in terms that materials are to be lent "to pupils" rather than to the non-public schools directly, is precisely the kind of "legal minuet"[8] which the State ought not be allowed successfully to dance, for the sole difference between the Ohio and Pennsylvania schemes is in the words inserted into the Ohio statute which purport to establish that the materials and equipment are loaned to the pupils. The wholly fictional nature of that purported legal relationship between the pupils and the materials is made obvious—if it is not obvious enough by itself—by the additional terms of §§3317.06(B) and (C) which authorize the expenditure of public funds "to hire clerical personnel to administer such lending program," and by §3317.06(L) which explicitly al-

7. The aid in *Meek* said to be "massive" averaged $30 for each non-public school pupil for auxiliary services. 421 U.S. at 352, n.2. The aid provided by the Ohio statute before the Court averages $176 for each non-public student per year for all the programs (J.S., p. A32), six times the average Pennsylvania figure. That is at least as "massive" as the aid supplied in *Meek*, even taking into account that it includes instructional materials and equipment, and field trip transportation.

8. *Lemon* v. *Kurtzman, supra* at 614.

lows the materials and equipment to be stored on the premises of the non-public school, and allows the publicly-employed clerical administrators of the program to perform all their duties on those premises as well.

The constitutionality of the Ohio program is based on a will-of-the-wisp distinction that is so abstract that the statute has exactly the same "impermissible primary effect of advancing religion" as the arrangement in *Meek*. The statutory distinction is meaningless for the additional reason that, like the tuition grants in *Nyquist*, "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." 413 U.S. at 783. As the Court said in *Sloan* v. *Lemon*, 413 U.S. 825, 832 (1973), "... we look to the substance of the program and no matter how it is characterized, its effect remains the same."[9] See also *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29, aff'd., 417 U.S. 961 (1974). To sustain the statute would require the Court to ignore reality, a pose which it explicitly declined to strike in *Meek*. 421 U.S. at 365.

### 3. Auxiliary Services

Of the various auxiliary services to be provided from public funds under the Ohio statute, we believe that the Constitution forbids some of them from being furnished at all; that, with two exceptions, none of them can constitutionally be conducted on the premises of the non-public

9. The statutory language which requires that the materials and equipment "be incapable of diversion to religious use" does not change the result. Such things as projection and recording equipment are "readily divertible to religious uses" and, consequently, "excessive entanglement of church and state would result from attempts to police [their] use . . ." *Meek*, *supra* at 366, n.16.



schools; and that most may constitutionally be provided outside of the non-public schools under particularized standards. We believe that the several distinctions which we draw are supported specifically by the decision in *Meek* v. *Pittenger*, as well as the reasoning of *Nyquist* and *Lemon*.

#### *a. Services Which Are Entirely Forbidden*

In our view, guidance and counseling services may not be provided in any circumstances, on or off non-public school premises.[10] These services were struck down in *Meek*, where they were furnished on the non-public school premises, on the ground that the necessary "prophylactic contacts . . . give rise to a constitutionally intolerable degree of entanglement between church and state." 421 U.S. at 370. The Ohio statute now before the Court hopes to evade that limitation by providing that guidance and counseling services be furnished only off the premises of the parochial schools. Though the appellants do not challenge such a program provided at public expense if conducted in the public schools as part of a general program (J.S. p.27), presumably on the ground that the entanglement problem will not arise in that context,[11] we believe they grant too much in such a concession. We believe that the problems of entanglement involved in guidance and counseling are so inescapable, we oppose provision of those services no matter under what circumstances.

10. Sec. 3317.06(H) authorizes funds for such services, and requires that they be provided "in the public schools, in public centers, or in mobile units . . ."

11. Appellants do oppose such programs if conducted in public centers or mobile units. We associate ourselves with the arguments put forward by appellants on those grounds.

The court will recall that, although the guidance and counseling services in *Meek* were to be performed by public employees in the parochial schools, the primary apprehension was that those personnel were "performing important educational services . . . in an atmosphere dedicated to the advancement of religious belief . . ." 421 U.S. at 371. Though that physical atmosphere admittedly will not exist inside a public school building, an effective guidance and counseling service cannot be provided to parochial school students unless the public employees consult in depth with the teachers and administrators at the parochial schools in order to understand all that one must know of students, their work, their environment, and their ambitions in order to provide meaningful counseling. Moreover, the sensitive questions of career designation, college choice, selection of major field of study, and job preparation, all involve choices on which parochial school personnel hold strong views, and want their influence felt. The acquisition of the necessary information, and the required communication between the public and non-public employees, present the same "potential for impermissible fostering of religion" (Id. at 372) as existed in the *Meek* scheme.

### *b. Services Which May Not Be Provided on Non-Public School Premises*

Sections 3317.06 (D) and (F) provide that speech and hearing diagnostic services and diagnostic psychological services will be provided at public expense to non-public school students on their school premises.

Though footnote 21 of *Meek* suggested that diagnostic "speech and hearing services" may be a "class of general



welfare services for children" that may be supplied by the state even if an incidental benefit accrues to church-related schools, we urge the Court to review that tentative position and to forbid those services insofar as they are conducted on the premises of the non-public schools, for we believe that problems of entanglement will inevitably arise under those conditions. Diagnostic testing of this type on parochial school premises is as a practical matter so bound up with treatment and follow-up in substantive educational areas, such as curriculum and selection of materials, that substantial monitoring will be required, thus raising the same danger of entanglement present in the less debatable educational areas.

### *c. Services Which May Constitutionally Be Provided to Non-Public School Students on Public Premises*

On the basis of the principles previously discussed, we submit that the First Amendment is not violated if the state provides speech and hearing diagnostic services, diagnostic psychological services, therapeutic speech and hearing services, therapeutic psychological services, and remedial services for the handicapped to non-public school students if those services are performed on public premises by public employees as part of a general program of assistance for all students, public and private, and reasonable steps are taken to insulate the process from the influence of the parochial schools' educational program.

By "public premises" we mean the premises of public schools, or "public centers" and "mobile units", as provided by the Ohio statute. However, if the services are furnished in "public centers", such centers must be de-

signed and used to provide services to all students, public and private, and not be a subterfuge that give the appearance of being public but are actually used to provide the allowed services only or predominantly to parochial school students. Likewise, if "mobile units" are utilized to provide the allowed services, they must be the general method by which the services are provided to all students, public and private. They must in fact be mobile; they certainly cannot be permanently or semi-permanently stationed outside the door of one or more parochial schools in the hope that the slight physical distance between the school building and the unit will satisfy the constitutional standard.

If the conditions we describe above are met, and if the enumerated services are provided in premises which are in theory and in fact neutral and religion free, then provision of those services does not in our opinion violate the Establishment Clause. In those circumstances, none of the three elements of the test for measuring violations of the Clause is met.

The crucial distinction is between services which are a part of the educational process of the parochial schools, and those which are non-educational and which objectively serve the health and welfare of non-public school students. If the services do serve the educational process, then they inevitably will have the primary effect of serving religion, since that is the dominant mission of church-related schools; and they will also, and with equal inevitability, result in the entanglement of church and state in the process which requires the state to be "certain" that that religious mission is not advanced. Where constitutionally



possible, we should avoid those situations which deprive any school child of services which objectively serve his or her physical or psychological health, or capacity to read, hear and speak effectively, which are generally available to students in the public schools, and which are conducted so as to avoid the problem of entanglement. Thus, we have attempted to draw a reasonable line which distinguishes between forbidden services, and those other services involving the physical and psychological health of the child which may be supplied to non-public school students under appropriate conditions without offending the Establishment Clause.[12]

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12. Only two types of services can, in our opinion, be provided on the premises of non-public schools. The first are those supplied by physicians, nurses, dentists and optometrists. Of course, Sec. 3317.06(E) of the statute before the Court provides for those very services to be furnished to parochial school students, but is not challenged in this suit. We believe, as the appellants apparently do, that such services are constitutional even if provided on non-public school premises since they directly serve the health and welfare of the students rather than any part of the schools' educational function, and therefore do not have the primary effect—or, indeed, any effect—of advancing religion. In addition, those services, by their very nature, do not present any of the dangers of entanglement between church and state since they need not be monitored to assure that the personnel involved do not advance the schools' religious mission. But even these kinds of medical services must meet two standards in order to pass the test of constitutionality. They must be part of a general program of inoculations, diagnosis, treatment or screening; and in order to avoid functioning as a subsidy to the church-related schools, the involved medical personnel may not be placed in those schools on a full-time or regular part-time basis.

The second service which may be supplied on non-public school premises is a course of strict physical therapy provided for the physically handicapped.

Though we believe that Secs. 3317.06(J) and (L), which provide respectively for provision from public funds of tests and scoring services, and field trip transportation, offend the Establishment Clause, we will, in the interest of brevity, associate ourselves with the arguments put forward by the appellants.

## Conclusion

**For the reasons set forth above, the decision below should be reversed and remanded.**

Respectfully submitted,

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March, 1977

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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BENSON A. WOLMAN, *et al.*,

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—v.—

MARTIN W. ESSEX, etc., *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

## BRIEF OF THE STATE CONVENTION OF BAPTISTS IN OHIO, THE CHURCHES OF GOD IN OHIO (Anderson, Indiana Affiliated), THE OHIO FREE SCHOOLS ASSOCIATION, AND THE OHIO CONFERENCE OF SEVENTH-DAY ADVENTISTS, AS *AMICI CURIAE*

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### Interest of Amici Curiae*

The State Convention of Baptists in Ohio is the governing body for the Southern Baptist churches in Ohio, representing approximately 400 congregations, and is affiliated with the Southern Baptist Convention which has more than ten million members in the United States. The Southern

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* Counsel for the appellants and appellees have orally consented to the filing of this brief. As soon as their letters of consent are forthcoming, they will be filed with the Clerk.

Baptists, both in Ohio and nationwide, have traditionally been in favor of a "wall of separation" between church and state and oppose any type of financial assistance to private, church-supported schools. *See, e.g.*, Brief of the Joint Conference Committee on Public Relations Representing the Southern Baptist Convention and others as *Amici Curiae* in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1 (1947).

The Churches of God in Ohio (Anderson, Indiana Affiliated) are a confederation of 204 Ohio Churches of God consisting of nearly twenty-five thousand, two hundred members. The Churches of God in Ohio, speaking through their Executive Council, are opposed to any expenditure of public funds for the benefit of parochial schools.

The Ohio Conference of Seventh-Day Adventists comprises ninety-one (91) Seventh-Day Adventists churches in Ohio having approximately ten thousand members. Churches in the Ohio Conference operate twenty-three (23) schools having approximately 1350 pupils, but they do not accept the type of aid challenged in this brief. They believe that the only proper sources of funds for their schools are tuition and the voluntary contributions of their members and other churches and not through the payment of taxes to a government entity. The Ohio Conference of Seventh-Day Adventists is opposed to any expenditure of public funds for the benefit of church sponsored schools including its own.

The Ohio Free Schools Association (OFSA) is an Ohio not for profit corporation comprising approximately 1200 members throughout the state of Ohio interested in the protection and encouragement of the free public school system



in Ohio. More particularly, the OFSA is concerned with the preservation of the First and Fourteenth Amendments' guarantees of separation of church and state when applied to the educational system. The membership of OFSA includes many educators, religious leaders and lay people of all persuasions, who, collectively and individually, are working to oppose the enactment of legislation that threatens to violate the establishment or the free exercise clauses of our Federal Constitution.

This brief is filed to provide the Court with the views of *amici* that a comprehensive and consistent First Amendment Establishment Clause policy can be delineated from the Court's prior decisions, although the approach will require the overruling of *Board of Education* v. *Allen*, 392 U.S. 236 (1968).[1]

*Amici* also wish to record their belief that it is morally and constitutionally wrong for any person to be forced to support the activities of any church. When citizens are compelled through taxation to support the parochial school, they are being compelled to support the church of which that school is an extension.

Since the parochial school is by definition a component of a church, and the pupil is a component of the school, the granting of tax funds, or of goods and services purchased with tax funds, to the pupil is equivalent to granting those funds to the church. It is obviously impossible to aid the part without aiding the whole.

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[1] This general supposition is certainly not novel to *Amici*, *see, e.g.*, 54 N. Car. L. Rev. 216, 224 (1976), nor is it unrecognized by some members of the Court. *Meek* v. *Pittenger*, 421 U.S. 349, 378-79 (1975) (Brennan, J., concurring in part, dissenting in part).

The verbal cosmetics used to disguise the tax support being given to church endeavors in the instance here under consideration range from the claim that the aid is only for the "non-religious" or secular parts of their educational-indoctrinational operations, to the labeling of the aid as "loans" to the pupil rather than as gifts to the school. As for the former claim, it should be pointed out that church schools like church buildings are comprised of many elements and constituents which, taken by themselves, are strictly non-religious in character. Yet, when joined together and combined around a central and all-pervasive religious purpose, they comprise a religious entity, with every part partaking of the nature and orientation of the sectarian totality. The First Amendment will indeed be divested of any real meaning or force if it is construed to permit taxes to be levied for the support of allegedly non-religious activities of churches.

As for the claim that text-books are "loaned" by the state to the students who attend parochial schools, let us ask—"When are these textbooks to be returned to the state?" The answer is, "Never!" There is no provision made in the enactment for their return. But, and if, they are returned, it will not be by the students who "borrowed" them, but by the parish schools, and they will be returned as expendable items whose useful life is over. What is being called a "loan" to the student is palpably a gift to the parochial school system, and therefore to the church that operates that system.

The *Amici* submit that the massive parochiaid measure here under consideration is unconstitutional not only because it violates the First Amendment's religious liberty stipulation, but also because it violates the "No establishment" clause. In effect, this legislation accomplishes a *de*



*facto* establishment of a few churches and grants preferential treatment to the particular method that they have chosen to use in teaching their youth. As Justice Douglas once stated:

> "The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools." (*Schempp* v. *Abington School Dist.*, 374 U.S. 203 (1963)).

The *Amici* wish to point out that at least one large denomination that operates almost all the nonpublic schools in Ohio receiving benefits under the Auxiliary Services Act obtains more in *involuntary* contributions (i.e. tax aid), just for its educational activities on the elementary and secondary level, than any other church receives from all sources combined. When the state subsidizes one of the main functions of the largest church in the state, it has gone a long way towards establishing that church as the official tax-supported religion of the land.

All religious groups are confronted with exactly the same needs and problems in regard to teaching and indoctrinating their youth, but most of them have chosen to use other means to accomplish their purposes in this area, than the operation of expensive elementary and secondary schools which interweave secular and religious instruction. Other churches are able to live within their incomes, without imposing the costs of their operations upon the general public. We are speaking the often-repeated sentiments of these bodies when we urgently request the Court to prevent any church from using the tax-collecting power of the state to compel those who do not subscribe to its tenets to pay the costs of its operations.

## Statement of Facts

Plaintiffs-appellants[2] brought this action to challenge the constitutionality of Ohio Revised Code § 3317.06 (hereinafter sometimes referred to as the "Statute" or the "Act"), which makes certain services and materials available to students attending non-public religious schools.[3] The case was tried before a three-judge district court which sustained the Act and this direct appeal followed.

Following the example of the appellants' Jurisdictional Statement, see pages 4-7, the relevant provisions of the Act will be summarized rather than quoted in full:

Section A provides for textbook loans to pupils or their parents. This provision is, of course, a response to this Court's holding in *Board of Education* v. *Allen*, 392 U.S. 236 (1968).

Section B authorizes local public school districts "to purchase and to loan" instructional material to pupils attending parochial schools. Although there is an attempt to delineate between secular and non-secular materials, it has been stipulated that this section approves the loaning of the same materials which were authorized in a previous

[2] Hereinafter the parties will be designated as they were in the trial court.

[3] While the statute involved here speaks in terms of aid to nonpublic schools, religious and secular alike, the district court, in previous church-state litigation, recognized that "the vast majority of nonpublic schools [in Ohio] are sectarian." *Kosydar* v. *Wolman*, 353 F.Supp. 744, 762 n.22 (S.D. Ohio 1972), *aff'd sub nom. Grit* v. *Wolman*, 413 U.S. 901 (1974). Hence the characterization of the statute as aiding "religious" schools is not unreasonable.



Ohio law which was declared unconstitutional in light of *Meek* v. *Pittenger*, 421 U.S. 349 (1975).

Public schools are empowered under Section C to loan instructional equipment in an identical manner to that established by Section B for instructional materials. And, like the material authorized in Section B, the equipment available under this section is the same equipment catalogued in the prior unconstitutional Ohio law.

Section D licenses the providing of "speech and hearing diagnostic services to pupils attending nonpublic schools. . . ." The services are to be performed "in the nonpublic school[s]."

Medical, dental and optometric services are sanctioned within the nonpublic schools by Section E, Section F grants diagnostic psychological services to pupils at the nonpublic school while Section G provides for "therapeutic psychological and speech and hearing" assistance away from the private school, "in public centers or in mobile units located off of the nonpublic premises. . . ."

Section H allows "guidance and counseling services" to be performed in public schools, public centers or mobile units in language similar to that employed in Section G.

Also following the outline of Sections G and H, Section I authorizes "remedial services" to be performed in public schools, public centers or mobile units.

Section J prescribes "standardized tests and scoring services" supplied by the public school system for the use by students of parochial schools.

Section K charters programs to be implemented by the public school district "for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district." These programs, too, are to be furnished off of the premises of the private school.

The last substantive section, Section L, provides transportation for field trips for students in nonpublic schools.

The remainder of the statute is administrative but does have some highly relevant language, some of which is set out in detail in the appellants' Jurisdictional Statement at pages 7 and 8.



## ARGUMENT

### I.

### Introduction

*Amici's* position in this action is that this Court's decision in *Board of Education* v. *Allen*, 392 U.S. 236 (1968) (hereinafter sometimes cited as *"Allen"*), should be overruled[4] since the case has generated the wave of constitutional litigation that Professor Freund so astutely predicted in his 1969 Comment, *Public Aid To Parochial Schools*, 82 HARV. L. REV. 1680, 1681 (1969) (hereinafter cited as "Freund"). *See also* 392 U.S. at 250 (Black, J., dissenting). In fact, *amici* would suggest that careful analysis demonstrates that *Allen* is a constitutional fossil, based upon a faulty premise, namely that the secular and religious mission of the religiously oriented primary and secondary school can be divided into a pure religious component and an untarnished non-religious component,[5] *see, e.g., Meek* v. *Pittinger*, 421 U.S. 349, 365-66 (1975) (hereinafter sometimes cited as *"Meek"*); *see generally* Note, *Aid to Parochial Schools: The Test Flunks*, 52 CHI-KENT L.

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[4] Although we have particularized our argument as applying to *Allen* alone, *amici* fully realize that *Meek* v. *Pittenger*, 421 U.S. 349 (1975), too validated a textbook loan plan; however, it seems to have done so solely on the basis of *stare decises*. *Cf.*, 421 U.S. at 359, 362.

[5] *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908), were the authority the Court used in *Allen* for its conclusion that nonpublic schools provided secular education. *Pierce* involved the question of whether attendance at a private school could qualify as attendance under a compulsory education law. In *Quick Bear* the Court allowed Indians to receive education at religious schools at their own cost. Neither seems very relevant to the aid to parochial education issue.

Rev. 683 (1976), and that attempts to draw upon its premise have led to legal and factual distinctions without meaningful differences. *See, e.g.,* Nowak, *The Supreme Court, the Religion Clauses and the Nationalization of Religion,* 80 Nw. L. Rev. 883, 890-91 (1976). This is a result which several members of the Court have at times recognized. *Meek,* 421 U.S. at 384 (Brennan, J., concurring in part, dissenting in part).

As a result, *amici's* particular interest in this case lies in the textbook loan program which presents the Court with the opportunity to review and, hopefully, overturn, *Allen.*[6] This brief, then, is primarily concerned with the proposition that *Allen* is no longer constitutionally sound and will leave it to appellants to argue the limits of permissible services that may be provided to children attending religious schools after *Meek.*

However, our focus should not be taken as a repudiation of the appellants' position that *Allen* need not be overruled for them to prevail. Rather, it is *amici's* feeling that while *Allen* can be distinguished and limited as it was in *Meek,* a more fruitful approach to the entire establishment clause-aid to sectarian education controversy can be established if *Allen,* the "genesis of the confusion" apparent in this area of the law, *A Survey of Selected Contemporary Church-State Problems,* 51 Notre Dame L. Rev. 737, 761 (1976), is allowed a respectable fast death as opposed to survival, only to be amputated piece by piece. Without *Allen* inter-

[6] This is not to say that *amici's* interest is solely limited to the textbook loan program. However, we believe that any proper construction of the First Amendment must begin with the overruling of *Allen.*



fering, a common thread can be found that neatly ties together the previous aid to parochial education cases and effectively weaves the tight comprehensive "wall of separation" that *amici* believes the First Amendment commands.

We intend to demonstrate this thesis by first discussing the reasons behind the First Amendment's establishment clause and the case law construing it. In this context we will follow the Court's development of the current "three-prong" (or perhaps "four prong") test utilized in assistance to religious elementary and secondary education cases. *See generally,* 50 Wash. L. Rev. 653, 655-660 (1975).

Secondly, we will examine the history of the aid to sectarian schools litigation in Ohio and the legislative attempts to circumvent the First Amendment. We do so fully appreciating the right of the state to enact legislation which attempts to pass constitutional muster by eliminating the evils pointed out in past decisions of the Court; however, in the case of the establishment clause, this recurrent theme has led to just the type of political debate and division that the First Amendment sought to forestall. *See, Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756, 795 (1973); Freund, 82 Harv. L. Rev. at 1692.

Finally, based on this foundation, we will suggest that a possible test for measuring state programs of aid to religious schools, which is akin to *Everson* v. *Board of Education,* 330 U.S. 1 (1947) (hereinafter sometimes cited as "*Everson*"), can be found permeating this Court's pre-*Allen* and post-*Allen* parochial aid opinions.

## II.

## The Historical Setting

The First Amendment to our Federal Constitution mandates that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," and, to be permissible, aid to primary and secondary religious educational institutions must come within its requirements.

That a strict separation between church and state was incorporated into the Bill of Rights was not an accident. Our founding father's ancestors had come to this continent in order to avoid the turnmoil, civil strife and persecutions generated by religious differences. Yet few of these settlers were advocates of religious freedom for others, for wherever they settled they established their own "state"—sponsored churches. The very charters granted these colonists usually guaranteed the right to erect religious institutions which all, believers or non-believers alike, were required to support and attend.[7]

So the practices of the old world passed to the new, and the old religious persecutions became new ones. And all of the non-believers, according to the description in *Everson* "were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith." *Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1, 10 (1947).

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[7] Examples of such charters can be found in the opinion of the Court in *Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1, 9 n.6 (1947), where the Court examines in detail the source of the First Amendment.



These practices shocked men like Madison and Jefferson and this shock and indignation ultimately found its expression in the First Amendment. First, however, their vexation became embodied in Madison's "Memorial and Remonstrance Against Religious Assessment", which is attached as an appendix to the dissent in *Everson,* 330 U.S. at 63, and in Jefferson's "Virginia Bill for Religious Liberty."

When one reads these several documents out of our past, he or she cannot quibble with Mr. Justice Rutledge's assertion that "no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises," 330 U.S. at 41 (Rutledge, J., dissenting), or with Mr. Justice Black's affirmation that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." *Id.* at 18.

The first major case claiming that state aid to nonpublic schools was in violation of the First Amendment was *Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1 (1946). *Everson* involved a plan whereby the state was to reimburse parents of all school children for the cost of bus transportation to and from school. The statute was challenged as being a law "respecting an establishment of religion" in that the benefit flowed through the parent to the parochial school.

By a five to four vote the Court ruled that a state could constitutionally finance the bus transportation of children to parochial as well as public schools. Although the majority, speaking through Mr. Justice Black, found the plan to be on the "verge" of an establishment, 330 U.S. at 16, they upheld its constitutionality since the direct beneficiaries were the school children rather than the church-related

schools. Justice Black recognized that there was some benefit to the religious schools, but, he wrote, such benefit was only incidental and indirect.[8] Moreover, the *Everson* Court saw the statute as "public welfare legislation," 330 U.S. at 18, necessary to assure that every child would be transported in a safe manner.[9]

The Court at the outset made the point that "the State contributes no money to the Schools. It does not support them." *Id.* at 18. The Court then proceeded to succinctly establish the First Amendment prohibition against aid:

> New Jersey cannot consistently with the establishment clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.

*Id.* at 16. The fact that the Court used the phrase "institution which *teaches* the tenets and faith of any church" (emphasis added) in drawing its stricture is of some note. Obviously, the line of demarcation is much narrower under the above interdiction than it would have been had the Court only limited the prohibition to the use of tax-raised funds to *teach* the faith. Nor was the choice of words simply an accident, for the Court went on to conclude that:

> No tax in any amount, large or small, can be levied to support any *religious activities* or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

*Id.* at 16 (emphasis added).

Here, then, was a "wisp of doctrine" that those who sought public monies for church schools could grasp. For while Mr. Justice Black spoke of the "wall of separation", he found a way to save the New Jersey program. As a result of this opinion, "all manner of public aids to religious schools were advanced as benefiting individuals and not institutions." Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 SUP. CT. REV. 57, 61.

On the other hand, what the supporters of parochial aid failed to perceive was that Justice Black meant his opinion to be a "deliberate statement" setting the outside limit of permissable aid and not as a cornerstone to support various sorts of aid programs. *Board of Education* v. *Allen*, 392 U.S. 236, 250 (1968) (Black, J., dissenting). The obvious factor, although not articulated by the Court then or, for that matter, as yet, was that the aid granted in *Everson* did not cross the threshold into the school building. That is, the State did not enter the religious institution. If

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[8] The test established in *Everson* has become widlely known as the individual or child benefit theory and is, according to one commentator, "perhaps . . . one of the most frequently invoked ideas in church-state litigation." Dauper, *Everson* v. *Board of Education*: *A Product of the Judicial Will*, 15 ARIZ. L. REV. 307, 325 (1973). It has been extensively discussed as a means of justifying aid to parochial schools. *See, e.g.*, L. Pfeffer, *Church, State and Freedom*, 555-62 (1967); Areen, *Public Aid to Nonpublic Schools*: *A Breach of the Sacred Wall?*, 22 CASE W. RES. L. REV. 230, 248-53 (1971). However, much of the discussion has been sharply critical for placing form over substance. 58 MINN. L. REV. 657, 661 n.22 (1974).

[9] *Everson* is remembered not only for allowing state-aid to parochial schools, albeit on a very limited scale, but also because it was the first case to apply the establishment clause of the First Amendment to the states via the Fourteenth Amendment's guarantee of "liberty." In this context, *see Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). While there was little discussion of this aspect of the case, the concept is now accepted as "given fact". Piekarski, *Request and Public Aid to Private Education*, 58 MARQ. L. REV. 247, 251 (1975).

*Everson* is so limited, and one cannot study his dissent in *Allen* without believing that Mr. Justice Black would approve of such a reading, the interpretation of the establishment clause becomes simple, though hardly simplistic. Hence, while *Everson* dug the channel through which aid could flow to the private, religious schools, "it simultaneously constructed the gates by which it might later stop the flow of such aid." 50 WASH. L. REV. 653, 656 (1975).

Although dealing with Bible reading in public schools, *Abington School District* v. *Schempp,* 374 U.S. 203 (1962), is important to this area of the law because it provided various members of the Court an opportunity for an exhaustive inquiry into the core meaning of the First Amendment. For our examination, however, it is sufficient to focus only on the holding, later applied to state aid cases, that:

> [T]o withstand the strictures of the Establishment Clause there must be a *secular legislative purpose and a primary effect that neither advances nor inhibits religion.*

*Id.* at 222. (Emphasis added.)

In *Allen,* 392 U.S. 236 (1968), this Court applied the two-pronged *Schempp* test to uphold a New York statute authorizing textbooks to be provided, ostensibly on loan, to children attending non-public parochial schools. Mr. Justice White, who wrote the opinion for the Court, purportedly followed *Everson's* individual-benefit theory but, in doing so, fused it with the *Schempp* "purpose and primary effect" test.

Mr. Justice Black, whose opinion in *Everson* was theoretically controlling, was incensed. Professor Richard



Morgan, writing in the 1973 SUPREME COURT REVIEW, described Black's position thusly:

> "Justice Black, whose *Everson* opinion was supposedly being followed, thought it was not, and that the New York arrangement represented precisely the sort of danger he had warned against in 1947.
>
> • • •
>
> Clearly Justice Black was right. The decision in *Allen* went a step beyond *Everson.* . . ."

Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment,* 1973 SUP. CT. REV. 57, 63.

It was this step over the "verge" that has haunted the Court ever since. As will be seen, cases that followed *Allen* to the Court were burdened by the albatross. This is so because the premise that clearly underlies the Court's thinking in *Allen* is that education in a parochial school is separable into religious and non-religious components. Freund, 82 HARV. L. REV. at 1688. And, we suggest, this premise is wrong. There must be a religious element that is pervasive and inseparable, for, if not, there is no reason for parochial schools, whose entire *raison d'etre* is religious. *Id.*

The next major establishment clause case to come before the Court was *Walz* v. *Tax Commissioner,* 397 U.S. 664 (1969). While not an aid case, we mention it in passing because it was at this juncture that the Chief Justice nurtured what was to become the "third prong" of the establishment clause test. Although upholding a tax exemption for property used exclusively for religious purposes, the Court examined the exemption to see if the benefit created an "impermissible entanglement" between State and church. 397 U.S at 674.

During the 1970 Term, the Chief Justice completed the development of the three-prong test that had only been alluded to in *Walz*. The vehicle for his analysis was three cases[10] jointly decided under the title of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1970) (hereinafter cited as *"Lemon"*.[11]

The plan in *Lemon* provided for direct reimbursement to the nonpublic school for actual costs of books, instructional materials and teachers' salaries. The plan challenged in *Early* and *Robinson* enabled the state to pay a portion of the salaries of teachers employed by private schools.

The Court found that each plan had an excessive entanglement between church and State. However, even in rejecting the aid plans, the Court was beginning to be shadowed by *Allen*. The attempt to distinguish *Allen* on the ground that the statutes involved in *Lemon* provided aid directly while in *Allen* the aid went to the students is gossomer at best. *See* 403 U.S. at 621. And, Mr. Justice White scores the majority hard, when he points to the Court's "frank acknowledgement that 'we can only dimly perceive the boundaries of permissable government activity in this sensitive area of constitutional adjudication' [citation omitted] and that '(j)udicial caveats against entanglement'

[10] The cases decided besides *Lemon*, were *Early* v. *DiCenso* and *Robinson* v. *DiCenso*, 403 U.S. 602 (1970).

[11] The *Lemon* Court was the first to actually refer to a "three-prong" test: "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither inhibits nor advances religion . . . finally, the statute must not foster 'an excessive entanglement with religion.'" 403 U.S. at 612-13. The development of the test is tracted in *Wolman* v. *Essex*, 342 F. Supp. 399, 406-11 (S.D. Ohio 1972), *aff'd* 409 U.S. 808 (1972).



are a 'blurred, indistinct and variable barrier.'" 403 U.S. at 671 (White, J., dissenting).

On June 25, 1973, the Court handed down four opinions in the church state area. Three dealt with primary-secondary schools[12] while the fourth, *Hunt* v. *McNair*, 413 U.S. 734 (1973), upheld a South Carolina program which provided benefits to sectarian institutions of higher learning by allowing the institutions to borrow on the credit of the state.[13]

Of the four cases, however, *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973) (hereinafter cited as *"Nyquist"*), is the most important. In *Nyquist* a New York plan designed in the hope of satisfying the tests established in *Lemon*, *Walz* and *Allen*, 58 Minn. L. Rev. 657, 660-61 (1974), and which reimbursed parents for tuition paid, made direct grants to schools for the costs of maintenance and repair, and provided a tax credit for tuition payments to private schools was struck down. The Court concluded that all three components of the law

[12] The related cases decided on the 25th and not discussed in the above text were: *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973) (invalidating a New York statute providing for reimbursement of private schools for certain costs of state required testing materials); *Sloan* v. *Lemon*, 413 U.S. 825 (1973) (holding unconstitutional a Pennsylvania statute providing tuition reimbursement to parents of nonpublic school children). *See also*, *Essex* v. *Wolman*, 409 U.S. 808 (1973), *motion for leave to file petition for rehearing denied*, 413 U.S. 923 (1973).

[13] *Hunt* and its predecessor, *Tilton* v. *Richardson*, 403 U.S. 672 (1971), are not consequential in this case since the differences between higher education and primary and secondary education raise different principles. *See, e.g.*, 413 U.S. at 746. *But cf.*, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 172 (1971).

had a "primary effect that advances religion." 413 U.S. at 774.[14]

The primary objection was that no effort was made "to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes." 413 U.S. at 774.

As in *Lemon,* the *Nyquist* Court was bothered by the shadow of *Allen.* Mr. Justice Powell, the author of *Nyquist,* attempted to distinguish the program before the Court

[14] In this case the Court also stressed a fourth factor: "One factor of recurring significance in this weighing process is the potentially divisive effect of an aid program." *Id.,* at 795. It stated that while perhaps this factor was not conclusive, it was certainly a "warning signal" not to be ignored. *Id.,* at 797.

To the extent the Court has carved exceptions to the strict mandates of the establishment clause, states are now *permitted* to provide, whether directly or indirectly, certain types of aid to religious schools.

As such aid is permitted to continue, these schools will become more and more dependent upon it for their very existence.

Today we are faced with a political climate wherein the proponents of state aid to religious schools have the willing ear of the legislature.

One factor that appears to have been overlooked to a large degree is that there is no *requirement* that the state provide this aid.

Suppose therefore that the political climate changes and that the state legislatures become dominated by opponents of religious aid. What is to stop them from attempting to impose conditions upon the continuance of state aid. Suppose for example, they were to attach as a condition to an appropriation bill the requirement that all religious artifacts be eliminated from religious schools or that the tenets of the particular religion not be taught therein. What could be a clearer example of entanglement, or, indeed, of direct state intervention? And yet how could the church challenge so manifestly unjust a requirement? Any effort on their part to do so would result in the withdrawal of the state aid upon which they rely for their existence.

The potential for abuse of religion by the states is so enormous that it seems obvious that the "wall of separation" is likely to crumble in the dust of politico-religious turmoil and upheaval.



from those approved in *Allen* by pointing out that in *Allen* the textbooks were loaned to *all* children whereas only non-public school children participated in the *Nyquist* programs. But, the question still remains, why are textbook loans acceptable but not other types of secular loan programs directed solely to students? *See* 413 at 800-05 (Burger, C. J., dissenting.)

In *Meek* v. *Pittinger,* 421 U.S. 349 (1975), the Court was again faced with the *Allen* problem when it reviewed an auxiliary services and textbook loan program from Pennsylvania. The statute before the Court provided for loans of textbooks, instructional materials, instructional equipment and auxiliary services to students of qualifying non-public schools. All aid, in seeking to avoid the objections raised in *Lemon* was limited to non-sectarian, neutral and non-ideological functions. Further to avoid the objections of *Lemon* and *Nyquist,* the equipment, materials and auxiliary services were "loaned". Only the students and not the parochial schools were to benefit economically. And, in an effort to avoid further religious involvement, the auxiliary services were to be provided by employees of the public school system.[15]

This Court upheld only the loan of textbooks finding it to be substantially identical to the plan affirmed in *Allen.*

Although hardly distinguishable from textbooks by any rule of reason, 54 N. Car. L. Rev. 216, 222 (1976), the Court struck down instructional materials (clearly non-religious) since:

[15] The equipment allowed under the Pennsylvania act included projectors and recording equipment—clearly adaptable to religious training—and this portion of the act was struck down by the district court which approved the remainder of the program.

> [e]ven though ear-marked for secular purposes '[w]hen [aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the primary effect of advancing religion.

421 U.S. at 366.[16]

The *Meek* Court's upholding of the textbook loan provision on the basis of *Allen* simultaneously with its invalidating the loan of clearly nonreligious instructional materials on the basis quoted above, makes *Allen* the triumph of form over substance. 54 N. Car. L. Rev. at 222-23.

Reaching this same conclusion, one commentator states:

> Thus, the line drawn by the opinion of the Court in *Meek* is no more satisfactory than that drawn in *Nyquist*. The Court was again unwilling to resolve the more basic issue, *i.e.*, whether or not the secular educational and religious training aspects of these schools really are separable. Until the Court is willing to either accept the separability concept and apply it consistently or reject it entirely, the patently inconsistent opinions of the past eight years are likely to be repeated in the future.

[16] The Court noted that *Public Funds for Public Schools of New Jersey* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd* 417 U.S. 961 (1974) directly supported their conclusion regarding the material and equipment loan provision of the act. Not surprisingly, the fact that *Marburger* affirmed the invalidation of a statute providing reimbursement to nonpublic school parents for their expenditures on secular textbooks was not discussed. *See, Marburger*, 358 F. Supp. 29, 31 (D.N.J. 1973).



*A Survey of Selected Contemporary Church-State Problems*, 51 Notre Dame L. Rev. 737, 769 (1976).[17]

The efforts of the legislature to avoid the objections previously found by the Court in *Lemon* and *Nyquist*, together with what has occurred after *Meek* as discussed in the next section of this brief, make it clear that so long as *Allen* remains the law of the land, this Court will be forced to rule on statute after statute, each statute evading prior objections, each hopeful of making further inroads into the separation of church and state. *See generally*, Note, *Aid to Parochial Schools: The Test Flunks*, 52 Chi.-Kent L. Rev. 683 (1976).

## III.

## Ohio: "The Dark and Bloody Background"

As stated in the Introductory section of this brief, it is our position that the Court's reluctance to overrule *Allen* has led to the adoption of a test which, at best, is confusing and, at worst, nonworkable. Moreover, the continued attempts to distinguish *Allen* from fact patterns brought before the Court have created just the type of political and social divisiveness that the First Amendment was meant to halt. *Cf.*, 421 U.S. at 372. As fast as courts void a repugnant statute, another is passed. *Cf., Lemon* v. *Kurtzman*, 403 U.S. at 624. Within each decision the proponents of parochial aid can always find just enough glimmer of hope to make another run to the legislature. *Cf., e.g.*, Skelly, *Meek* v. *Pittinger: Will It Precipitate a Solution*, 20 Catholic Lawyer 335, *especially at* 344-45 (1974). Usu-

[17] Of course, it is *amici's* opinion that separability is a fiction. 421 U.S. at 366. *Cf., Levitt* v. *PEARL*, 413 U.S. 472, 480 (1973).

ally time demonstrates that the hope was illusory but the legislative fights have long since occurred, leaving wounded feelings, deep scars and religious bigotry.

A good example of this can be found by looking at the history of aid to parochial education in Ohio, one state which has experienced more than its share of difficulty in this area. The Ohio legislature is subject to massive political pressure to provide vast amounts of financial aid to the parochial schools.[18] When acts are passed, they are couched in secular terms, but usually form is placed far above substance.[19]

Each legislative attempt to appropriate aid to sectarian schools has been met with a court challenge. *See, Wolman* v. *Essex,* 417 F. Supp. 1113 (S.D. Ohio 1976), *prob. juris. noted,* 45 U.S.L.W. 3463 (Jan. 10, 1977) (No. 76-496); *Wolman* v. *Essex,* No. CA 73-292 (S.D. Ohio 1973), *vacated,* 421 U.S. 982 (1975); *Kosydar* v. *Wolman,* 353 F. Supp. 744 (S.D. Ohio 1972), *aff'd sub nom. Grit* v. *Wolman,* 413 U.S. 901 (1974); *Wolman* v. *Essex,* 342 F. Supp. 399 (S.D. Ohio 1972), *aff'd* 409 U.S. 808 (1972) (hereinafter cited as *"Wolman I"*). And each successful court challenge has occasioned a new and more vigorous attempt by the Ohio Legislature to provide massive aid to the Ohio parochial schools.

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[18] The case at bar, for example, involves an appropriation of over 88 million dollars. *Cf., Meek* v. *Pittenger,* 421 U.S. at 365 n.15, where Mr. Justice Stewart points out that Pennsylvania appropriated $16,660,000 in 1972-73 for supplying just instructional materials and equipment to the state's parochial schools.

[19] The plans vary in degree of originality and have led Mr. Justice Brennan to write that ". . . it should be observed that sophisticated attempts to avoid the Constitution are just as invalid as simple minded ones." *Meek,* 421 U.S. at 381.



The first such attempt to skirt the Constitution came in response to *Lemon* v. *Kurtzman,* 403 U.S. 662 (1971), when the legislature passed and the Governor signed a plan for tuition reimbursement. On the very day that the act became law, *Wolman I* was filed and, on April 17, 1972, a three judge court ruled that the plan was unconstitutional.

Little over two months later, the Ohio General Assembly passed another bill. This time, a tax credit for parents of students enrolled in private schools was the means to attempt to circumvent this Court's opinions. Strikingly, the amount of money set aside to fund the program was almost the identical amount appropriated prior to, and which was in issue in, *Wolman I.*

Moreover, on the day the bill was passed, but before it was signed into law by the Governor, a suit was filed in state court by the State of Ohio[20] seeking a declaratory judgment to clarify the constitutionality of the Act. Upon filing, state officials boasted publicly that they had beat the opponents on this one. Defendants in that suit were persons who had previously challenged the constitutionality of aid to parochial schools.[21] The defendants subsequently removed the case to federal Court where the Act was declared illegal.[22]

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[20] Actually the case was brought in the name of the Tax Commissioner.

[21] In addition, parents of nonpublic school children were joined as defendants but were realigned as parties plaintiff by the United States District Court. *Kosydar* v. *Wolman,* 353 F. Supp. 744, 749, 749 n.2 (S.D. Ohio 1972), *aff'd sub nom. Grit* v. *Wolman,* 413 U.S. 901 (1974).

[22] The district court held in a per curiam opinion that the legislature had indeed eliminated the unconstitutional direct grants involved in *Wolman I.* However, the tax credits substituted for the direct grants accrued to the same sectarian group as before and the ploy was recognized by the Court. *Id.*

It takes little imagination, however, to suggest that it was divisive in the extreme to have proponents and opponents of parochial aid quarreling in the courts at the instigation of the State.

During the summer of 1973, the Ohio General Assembly again became the arena for the antagonists. The General Assembly appropriated 81.4 million dollars under an "auxiliary services" plan. This plan led to the filing of *Wolman III*. *Wolman* v. *Essex,* CA 73-292 (S.D. Ohio 1973), *vacated,* 421 U.S. 982 (1975). This was the third time in as many years that the Ohio legislature had appropriated the same approximate amount of money for aid to privately maintained religious primary and secondary schools. Again, only the terms had been changed—form still taking precedence over substance.

The District Court ruled in favor of the appropriation, reasoning that the materials and services were not religious in nature and, therefore, in line with *Allen,* could be provided to the parochial schools. Following *Meek, Wolman III* was vacated and remanded for reconsideration. *Id.*

When it became obvious to all that *Meek* would be applicable to the auxiliary services program, the legislature changed the form, but still not the substance, of the legislation and, for the fourth time, appropriated the same money. It is this Act, signed into law just prior to the beginning of the 1975-76 school year, that is the subject of the current litigation.

This short history demonstrates the complicated struggle to provide aid to parochial schools in almost apparent contravention of the First Amendment. The Ohio legislature, bowing to intensive lobbying, has attempted time and



again to thread the needle between *Allen* and the various other standards established by the Courts. In Ohio, *Nyquist, Lemon* and *Meek* have only intensified the serious and, sometimes bitter, dispute over aiding schools maintained by religious groups. Rather than ending religious divisiveness, the adoption of each new test and each attempt to distinguish *Allen* has brought new litigation and increased religious-political strife. We believe that adoption by the Court of the test set forth below will eliminate the need for this perpetual litigation and halt the religious-political strife which such protracted litigation breeds.

## IV.

## The Court Should Reverse *Allen* and Adopt More Concrete Standards.

As we have amply demonstrated in the first three sections of this brief, *Allen* has not served the First Amendment well. In fact, Justice Rutledge's words in his dissent in *Everson,* after quoting Thomas Jefferson's Bill for Establishing Religious Freedom, ring truer today than when written:

> I cannot believe that the great author of those words, or the men who made them law, could have joined in this decision. Neither so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia's great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth. New Jersey's statute sustained is the first, if indeed it is not the second breach to be made by this Court's action. *That a third, and*

> *a fourth, and still others will be attempted, we may be sure.* For just as *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370, has opened the way by oblique ruling for this decision, so will the two make wider the breach for a third. Thus with time the most solid freedom steadily gives way before continuing corrosive decision.

330 U.S. at 29 (emphasis added).

Yet, *amici* believe that Justice Rutledge overstated the case in *Everson.* For, if properly applied, *Everson* can be a wall which is as impregnable as the First Amendment requires. Of course, as has been suggested throughout this brief, a proper application of *Everson* to this case necessitates the overruling of *Allen.* We would also propose that several principles from the majority opinion of Mr. Justice Black in *Everson* are the benchmarks of a valid employment of the decision.

1) The Court is concerned with *substance,* not *form. Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1, 15 (1946). This proposition was emphasized in language on which the Court was unanimous:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, *whatever they may be called, or whatever form they may adopt to teach or practice religion. . . .*

330 U.S. at 15-16 (emphasis added); *accord,* 330 U.S. at 33 (Rutledge, J., dissenting).

2) The Court felt that the facts in the case approached the "verge" of the restraints of the establishment clause,



*id.* at 15, and certainly did not intend the doctrine to be extended beyond its facts.

3) The Court felt that the benefit to the religious institution was a mere by-product of unintended aid. Surely the policeman on the beat, to which the Court analogized, has no direct intention of aiding religious institutions as he performs his duties. 330 U.S. at 25 (Jackson, J., dissenting). The legislation, according to the Court, "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 18.

4) The Court in upholding the action as general welfare legislation and in analogizing the benefits conferred thereby to those bestowed by virtue of police and fire services, could never have intended that the case be extended to the loan of school books to students of sectarian schools. The utter outrage expressed by Justice Black in his dissent in *Board of Education* v. *Allen, supra,* makes this obvious.

5) The case involved aid which did not cross the threshold and invade the sanctuary. And, while this fact was not pronounced by the Court, it is apparent that it is the fulcrum on which the opinion stands. *Compare Everson, supra, with Allen,* 392 U.S. 236, 251 (1968) (Black, J., dissenting).

From this analysis of the Court's decision in *Everson,* we believe that a two part test can be abstracted as follows:

Aid will be allowed if either:

(1) it confers a benefit which is a by-product of unintended aid, i.e., fire and police protection (Civil services such as the fire department are not established with the intention of aiding the parochial schools); *or*

(2) (i) the aid does not, either directly or indirectly, cross the threshold of the religious institution, and (ii) the student is the sole beneficiary of the aid. Under the second test, the bussing allowed in *Everson* qualifies; yet the textbook grants or loans ratified in *Allen* must fall. In addition, off-campus medical, dental and other social services will survive challenge.

We presume, however, that the mobile classroom or office parked at the curb near the parochial school, while technically off school property, is across the forbidden threshold. *Amici* arrive at this conclusion since any test that the Court uses must never permit form to govern over substance.

It is respectfully suggested that the above test will support, and is reconcilable with, every primary-secondary parochial school case decided by this Court except *Allen* and the textbook holding portion of *Meek*. Textbooks are an inseparable part of the primary educational functions of parochial schools and are inextricably intertwined with their religious mission. The textbook programs should have been invalidated, if not in *Allen*, then, at least, in *Meek*. This may be the last opportunity for the Court to take "the bolder actions of overruling *Board of Education* v. *Allen* and striking the textbook program in *Meek*." 54 N. Car. L. *Rev*. 216, 224 (1976). This incisive step "would more clearly establish the lines of state neutrality without requiring the sacrifice of consistency," *id.*, and resurrect the "wall of separation" that Mr. Justice Black forged when he authorized *Everson*.



## CONCLUSION

Wherefore, *amici* respectfully ask this Court to overrule *Allen* and insure that the "establishment of religion" clause of the First Amendment still means at least this:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . ."

330 U.S. at 15-16.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 1976

## No. 76-496

BENSON A. WOLMAN, FREDRICK CHAMBERS, PATRICIA J. KEENAN, BARBARA KAYE BESSER, NANCY R. TERJESEN, and MARJORIE WRIGHT,

*Appellants,*

*v.*

MARTIN W. ESSEX, Superintendent of Public Instruction of the State of Ohio; STATE BOARD OF EDUCATION; GERTRUDE W. DONAHEY, Treasurer of the State of Ohio; THOMAS E. FERGUSON, Auditor of the State of Ohio; BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF COLUMBUS, OHIO; HANNA FEIGENBAUM, JAMES GRIT, EWALD KANE and HELEN S. KOLOSKI,

*Appellees.*

**On Appeal from the United States District Court for the Southern District of Ohio Eastern Division**

# MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY *AMICUS CURIAE*

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**On Appeal from the United States District Court for the Southern District of Ohio Eastern Division**

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The undersigned, as counsel for National Coalition for Public Education and Religious Liberty, respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of appellants' claim that an Ohio statute providing various forms of aid to religiously affiliated elementary and secondary schools violates the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

Appellants have consented to the filing of this brief. Counsel for appellees have not responded to our request for consent.

The interest of the *amicus* and the names of the constituent organizations for which it speaks in filing this motion are set forth in the attached brief. Each of those constituents and the National Coalition believe that the statute challenged here is but one of a series of measures designed to evade the strictures of the No-Establishment Clause with respect to government aid to religious educational institutions. Furthermore, the National Coalition is party to an action now pending in the Southern District of New York challenging the constitutionality of practices taking place under the Federal Elementary and Secondary Education Act of 1965 which in some respects parallel practices challenged in this case. *National Coalition for Public Education and Religious Liberty, et al.* v. *F. David Mathews, et al.*, 76 Civ. 888 (CHT). We believe that our experience in dealing with this issue will enable us to contribute to the resolution by this Court of the important constitutional issue pending before it and accordingly submit this motion.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

**October Term, 1976**

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BENSON A. WOLMAN, *et al.*,
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*v.*

MARTIN W. ESSEX, *et al.*,
***Appellees.***

**On Appeal from the United States District Court for the Southern District of Ohio Eastern Division**

## BRIEF OF NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY *AMICUS CURIAE*

### Interest of the *Amici*

The National Coalition for Public Education and Religious Liberty is, as its name indicates, an unincorporated association of national, state and local organizations committed to the protection and preservation of both public

education and religious liberty. It submits this brief *amicus curiae* in behalf of the following of its constitutent organizations:

American Association of School Administrators;

American Ethical Union;

American Humanist Association;

American Jewish Congress;

Americans United for Separation of Church and State;

Baptist Joint Committee on Public Affairs;

Board of Church and Society of the United Methodist Church;

Central Conference of American Rabbis;

Illinois Committee for Public Education and Religious Liberty (PEARL);

Missouri Baptist Christian Life Commission;

Missouri PEARL;

New York PEARL;

Monroe County, New York PEARL;

Nassau-Suffolk PEARL;

Michigan Council Against Parochiaid;

National Association of Laity;

National Council of Jewish Women;

National Education Association;

National Women's Conference, American Ethical Union;



Preserve Our Public Schools;

Public Funds for Public Schools of New Jersey;

New York State United Teachers;

Ohio Free Schools Association;

Union of American Hebrew Congregations;

Unitarian Universalist Association.

We believe that the statute whose constitutionality is presented in this case represents a serious threat to the integrity of both public education and religious liberty. We regard the dual principle of religious liberty and separation of church and state as fundamental to American democracy. We deem any breach in the wall separating church and state as jeopardizing the political and religious freedoms which that wall was intended to protect.

Furthermore, we regard our free non-sectarian public school system as one of the most precious products of our American democracy and a unique contribution to modern civilization. We believe that the success of our free public school system is based in substantial part upon maintenance of separation of church and state and that acceptance of the theory that religious educational institutions may compete for tax-raised funds with the public school system not only violates the Constitution but in the long run tends to destroy public education. We believe that the same constitutional provisions which protect the institutional integrity of religious schools against governmental interference protect public schools from competition by religious schools in the allocation of funds raised by taxation for public education. We therefore express our opposition whenever at-

tempts are made to compromise the principle of separation of church and state or the integrity of our public school system.

## Statute Involved

The text of the statute challenged in this suit, Ohio Revised Code Section 3317.06, signed into law on August 29, 1975, is set forth in full on pp. A36-A40 of the Jurisdictional Statement in this appeal and a summary and explanation of the statute is set forth on pp. 4-8 of the Jurisdictional Statement. Accordingly they need not be repeated here.

## The Question to Which This Brief Is Addressed

The questions presented in this appeal are set forth on pp. 8-10 of the Jurisdictional Statement. The single question to which this brief is addressed is whether a statute providing tax-raised funds to support the educational programs of parochial schools beyond transportation and the loan of secular textbooks violates the Establishment Clause of the First Amendment as made applicable to the States by the Fourteenth.

## Statement of the Case

The statement of the case is set forth on pp. 10-12 of the Jurisdictional Statement and need not be repeated here.



## Summary of Argument

The decisions of this Court have made it clear that educational services in religious schools may not be financed in whole or in part by tax-raised funds beyond the provision of transportation for the pupils and the lending of secular textbooks for use by the pupils of these schools. The statute challenged in this suit is another of the many instances of efforts by state legislatures to evade these decisions and the principles upon which they are founded. Preservation of the jurisdiction of this Court, the principle of judicial review and the integrity of the Establishment Clause of the First Amendment all require reversal of the decision of the court below and the invalidation of the challenged statute to the extent that it provides for public financing of educational services in religious schools beyond transportation and the loan of secular textbooks.

## ARGUMENT

**To the extent that the challenged statute provides for state financing of educational services in religious schools beyond transportation and the loan of secular textbooks, it violates the Establishment Clause of the First Amendment as construed and applied in the decisions of this Court.**

The Constitution, by its own terms (Article VI), is the supreme law of the land and every state, by voluntarily becoming part of the Union and thus accepting the Constitution, accepts too its supremacy. Ever since *Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137 (1803), it has been recognized that the ultimate responsibility for interpreting the Con-

stitution and determining conclusively whether a particular statute, state no less than federal, is consistent with the Constitution, rests with the courts and ultimately with the Supreme Court of the United States.

Those who wrote our Constitution recognized that its terms or their judicial interpretation might not always be acceptable to the people of the nation. Accordingly, they provided in Article V a procedure to alter its terms, a procedure which from the Eleventh Amendment on has most often been used for the purpose of nullifying in whole or in part unacceptable decisions of this Court.[1] What those who wrote our Constitution perhaps did not anticipate but certainly did not or would not countenance was evasion of its prohibitions through ingenious devices, simple or sophisticated.

For many years the history of the Equal Protection Clause of the Fourteenth Amendment was in large measure a chronicle of state efforts, legislative, executive and judicial, to vitiate the protection it sought to provide for racially disadvantaged Americans. These were undertaken because it was quite obvious that the American people were not prepared to turn the clock back and eliminate the Clause from the Constitution or nullify the Court's interpretation of its meeting.

Closer to the situation presented in the instant case has been the history of the Court's decisions in *Engel* v.

1. *E.g.*, Thirteenth and Fourteenth Amendments nullifying *Dred Scott* v. *Sanford*, 19 How. (60 U.S.) 393 (1857); Sixteenth Amendment nullifying *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895); Twenty-sixth Amendment overruling, in part, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).



*Vitale*, 307 U.S. 421 (1962), and *Abington School District* v. *Schempp*, 370 U.S. 203 (1963). During the decade and a half since these decisions outlawed state-sponsored prayer and devotional Bible reading in the public schools, determined efforts have been made to overrule them through constitutional amendment.[2] These efforts, dating almost from the day after *Engel* was decided, having all failed and the prospects of success for any future attempts along this line being obviously extremely dim, efforts turned towards *de facto* nullification in the form of attempted evasions. Some were simple, some more sophisticated, but all were alike in having the purpose of nullification and in uniformly failing in the courts, including this Court.[3]

This Court's decisions limiting governmental aid to parochial schools to transportation and the loan of secular textbooks have experienced a substantially parallel history. The protagonists of aid to parochial schools recognize that the chances of amending the Constitution to overcome the Court's decisions in this area are so small as to be negligible. Hence, unlike the case of the prayer and Bible reading decisions, no such effort has been made. (Ten proposals

2. See Hearings before the Committee on the Judiciary, House of Representatives, 88th Congress, Second Session, on Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools.

3. See, *e.g.*, *De Kalb School District* v. *DeSpain*, 255 F. Supp. 655, affirmed 384 F. 2d 836, certiorari denied, 390 U.S. 906 (1968) ("cookie prayer" from which the word "God" was eliminated); *Stein* v. *Oshinsky*, 224 F. Supp. 757, affirmed 348 F. 2d 999, certiorari denied, 382 U.S. 957 (1965) (parents' suit to compel school to permit pupil-initiated prayer); *State Commission of Education* v. *School Committee*, 358 Mass. 776, certiorari denied, 401 U.S. 929 (1971) (pupil-initiated prayer permitted by school authorities); *Board of Education of Netcong* v. *State Board of Education*, 108 N.J. Super. 564, affirmed, 57 N.J. 172, certiorari denied, 401 U.S. 1013 (1971) (prayer read from Congressional Record).

to amend state constitutions have been presented to the voters for determination at the ballot box. Nine were defeated; one succeeded, and that one, in Michigan, unlike all the others, strengthened rather than weakened the ban on aid to parochial schools.)[4] This fact has not deterred the legislatures in a number of states, notably New York, Pennsylvania and, of course, Ohio, among others, in the search to overcome the Establishment Clause, which they deem a foe to be evaded and outwitted by whatever stratagem may prove effective. If purchase of services won't work,[5] try tuition reimbursement. If that won't work,[6] try tax deductions and credits.[7] If they prove unsuccessful, perhaps payment for auxiliary services may get through.[8] If that won't work, go back to the drawing boards and come up with something new. What we are witnessing is a sort of historic game of chess played between ingenious lawyers and legislators on one side and this Court on the other side of the chessboard of the Establishment Clause, with each move by the former checked by the latter, but the game continuing in the hope that a successful move will ultimately be found.

The generation that wrote the Establishment Clause into the Constitution did not view it as an enemy of the people. On the contrary, they deemed it the surest and

4. New York (1967); Michigan (1970); Nebraska (1970); Oregon (1972); Idaho (1972); Maryland (1972); Maryland (1974); Washington (1975); Missouri (1976); Alaska (1976).

5. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

6. *Sloan* v. *Lemon*, 413 U.S. 825 (1973).

7. *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973).

8. *Meek* v. *Pittenger*, 421 U.S. 349 (1975).



most effective protector of religious freedom, and expected that its spirit as well as its letter would be honored by future generations. Above all, they intended to bar just the type of legislation involved in the present litigation.

With the exception of *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and *Board of Education* v. *Allen*, 392 U.S. 236 (1948), which upheld respectively the constitutionality of transportation and textbook aid to church schools, the decisions of this Court, at least as far as elementary and secondary schools are concerned, have consistently rejected every legislative effort to channel tax-raised funds to church schools, directly or indirectly, as violative of the Establishment Clause.

In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the Court invalidated a purchase-of-services statute financed out of the proceeds of horseracing.

In *Sanders* v. *Johnson*, 403 U.S. 955 (1971), it affirmed without opinion a district court decision (319 F. Supp. 421) holding unconstitutional a purchase-of-services statute financed out of the general treasury.

In *Early* v. *DiCenso*, 403 U.S. 602 (1971), it held unconstitutional a salary supplement law.

In *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), it ruled invalid a statute providing tuition payments for low-income families.

In *Sloan* v. *Lemon*, 413 U.S. 825 (1973), it invalidated a tuition reimbursement law.

In *Essex* v. *Wolman,* 409 U.S. 808 (1973), it affirmed without opinion a district court decision (342 F. Supp. 399) ruling unconstitutional a general tuition grants law.

In *Nyquist, supra,* it struck down a law providing tax benefits for parents whose children attend parochial schools.

In the same decision, it held unconstitutional statutory maintenance and repair grants to parochial schools.

In *Grit* v. *Wolman,* 413 U.S. 901 (1973), it affirmed without opinion a District Court decision (353 F. Supp. 744) barring tax credits for parents of parochial school pupils.

In *Levitt* v. *Committee for Public Education and Religious Liberty,* 413 U.S. 472 (1973), it nullified statutory grants to pay for law-mandated services performed in parochial schools.

In *Brusca* v. *State Board of Education,* 405 U.S. 1050 (1972), it affirmed a decision (332 F. Supp. 275) holding that exclusion of parochial schools from tax-funding of education did not violate any constitutional rights of parents sending their children to such schools.

In *Franchise Tax Board* v. *United Americans for Public Schools,* 419 U.S. 890 (1974), it affirmed a District Court decision invalidating a statute providing tax reductions for parents of parochial school pupils.

In *Luetkemeyer* v. *Kaufmann,* 419 U.S. 888 (1974), it affirmed a District Court decision (364 F. Supp. 376) upholding a Missouri law limiting free transportation to pupils attending public schools.



In *Marburger* v. *Public Funds for Public Schools,* 417 U.S. 961 (1974), it affirmed a District Court decision (358 F. Supp. 29) holding unconstitutional on its face a New Jersey statute providing auxiliary services, textbooks, instructional materials and instructional equipment to private and parochial schools.

In *Meek* v. *Pittinger,* 421 U.S. 349 (1975), it invalidated, except in respect to the loan of textbooks, a statute which, like the statute invalidated in *Marburger* and the Ohio statute which was the predecessor of the one now before the Court, provided for a variety of so-called auxiliary services "and such other secular, neutral and non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

Finally, in *Wolman* v. *Essex,* 421 U.S. 982 (1975), the Court, on authority of *Marburger,* reversed and remanded a District Court decision (342 F. Supp. 399) upholding the constitutionality of the predecessor of the present statute, whereupon the District Court determined that it was not constitutionally distinguishable from the statute in *Meek* and adjudged it unconstitutional.

*Meek* was decided on May 19, 1975; *Wolman* v. *Essex* on May 27, 1975. Three months later, the bill involved in the present case was signed into law.

These are not the only instances of legislative efforts to evade the decisions of this Court in applying the Establishment Clause to laws giving financial aid to religious schools. Indeed, on the same day that the Court decided

*Lemon* v. *Kurtzman* and *Earley* v. *DiCenso*, the governor of the State of New York signed into law a bill providing services which the United States District Court for the Southern District of New York shortly thereafter found indistinguishable from the statutes invalidated in *Lemon* and *Earley*.[9] Other instances might be cited, but what is remarkable about all of them is that in the short four years between *Lemon* and *Meek* so many different efforts in so many different states should be made to evade or nullify the decisions of this Court forbidding aid to parochial schools on the elementary and secondary school levels. What is not remarkable but highly encouraging to those committed to preservation of the principle of separation of church and state and the integrity of public education is that in each case, without exception, the effort has failed, either by rejection on the part of the people when presented to them in the form of a proposed constitutional amendment or by this Court after legislative enactment without benefit of recourse to the expressed will of the people.

Perhaps the starkest illustration of the change-in-form-but-not-in-substance patterns in the present case is the instructional materials provision in the challenged statute. In *Meek*, the Court held unconstitutional a Pennsylvania statute which, like the predecessor of the present Ohio law, provided for loans directly to nonpublic schools of "instructional materials and equipment, useful to the education" of nonpublic school children. The instructional materials included periodicals, photographs, maps, charts, recordings

9. *Committee for Public Education and Religious Liberty* v. *Levitt*, U.S.D.C. S.D.N.Y. No. 3218/1971. The District Court's decision, issued January 11, 1972 is unreported.



and films. The instructional equipment included projectors, recorders and laboratory paraphernalia.

The corresponding provision in the present Ohio statute is described by the District Court in the present case as follows (Jurisdictional Statement p. A12):

> Section 3317.06 (B) and (C) O.R.C. authorizes the local school districts to purchase and lend to nonpublic school pupils or to their parents instructional materials and equipment that are incapable of diversion to religious use, and to hire clerical personnel to administer the program. Examples of equipment supplied in the past under predecessor statutes include weather forecasting charts, lunar terrain models, fossil collections, and metric system materials. The statute further provides that the materials and equipment lent pursuant to the statute may be stored on the premises of the nonpublic school and the clerical personnel hired to administer the lending program may perform their duties upon the premises of the nonpublic school when necessary.
>
> The duties of the clerical personnel hired to administer the lending program includes: distribution of loan request forms and receipt of requests, maintenance of inventory, collection and distribution of materials and equipment, maintenance of custody and storage and other duties necessary for the efficient implementation of the program.

Even a cursory comparison of the Pennsylvania statute and its counterpart, the previous Ohio statute, on the one hand and the present statute on the other shows clearly that the only difference between them is that in the former the loan is stated to be to the nonpublic schools whereas in the present one it is to the pupils in those schools.

With all due respect, this provision borders on the absurd. It is simply beyond the realm of reality to accept the transactions authorized by the statute as loans to the children or their parents. It is safe to assume that, if the children and parents are borrowers, they are unconsciously so. One must stretch his imagination to an unusual degree to envision school pupils as borrowers of weather forecasting charts, lunar terrain models, fossil collections and metric system materials. Judicial acceptance of this transparent fiction, we respectfully suggest, would make of the Bill of Rights what Madison called a "parchment barrier." If the Establishment Clause can be so easily and effectively pierced, so too can every other guaranty in the Bill of Rights.

In respect to instructional materials and equipment, the Ohio legislature paid lip service (though no more) to what this Court has ruled in previous cases. In respect to testing and scoring services it did not even trouble to do that. Section 3317.06(J) O.R.C. authorizes the local school districts throughout the State of Ohio to supply for use by nonpublic schoolchildren within the district such standardized tests and scoring services as are in use in the public schools of the state. Such tests, according to the stipulations of the parties in the present suit, are used to measure the progress of all students in secular subjects.

Like the statute in issue in this case, the Pennsylvania law involved in *Meek* provided for testing services in religious schools. So too did the New Jersey statute invalidated in *Marburger*. In neither case was any distinction made in the Court's decision in respect to tests prepared



by teachers or other religious school personnel and standardized tests provided by state authorities. In both cases, the respective statutes were held unconstitutional.

This fact was recognized by the United States District Court for the Southern District of New York in the case of *Committee for Public Education and Religious Liberty* v. *Levitt*, 414 F. Supp. 1174 (1975). There, too, the Court was called upon to pass upon a statute enacted after this Court's decision in *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973). Like the statute here in issue, the New York statute sought to limit public financing of testing and scoring services to tests which were used in the public schools of the state. Reaching a conclusion directly contrary to that reached by the court below in the present case, the District Court in the Southern District of New York held that whatever ambiguity might be read into this Court's decision in *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973), was eliminated by its decisions in *Marburger* and *Meek*. Accordingly, it unanimously ruled the New York law violative of the Establishment Clause.

We add only that we find it difficult to see how it could have decided otherwise. Aside from this Court's decisions in *Marburger* and *Meek*, its decision in *Nyquist* impelled the same result. There the Court struck down statutory maintenance and repair grants to parochial schools, including the cost of heat, light, painting and sanitation services, services which are clearly at least as "secular, neutral and nonideological" as testing even through state-prepared tests.

**The fundamental point of all the decisions we have cited in this brief is that schooling is an indivisible unit not subject to artificial dissections that serve no purpose other than as efforts, fruitless so far, to evade the proscription of the Establishment Clause in respect to schooling in religious schools. The inescapable conclusion of these decisions is that preservation of the jurisdiction of this Court, the principle of judicial review and the integrity of the Establishment Clause all require reversal of the decision of the court below and the invalidation of the challenged statute to the extent that it seeks to provide for public financing of educational services in religious schools beyond transportation and the loan of secular textbooks.**

## Conclusion

**For the foregoing reasons, the judgment of the District Court should be reversed and the challenged statute should be declared unconstitutional.**

Respectfully submitted,

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February, 1977

# Supreme Court of the United States

**October Term, 1976**

**No. 76-496**

BENSON A. WOLMAN, *et al.*,
*Appellants,*

**vs.**

MARTIN W. ESSEX, *et al.*,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

## BRIEF OF 21 OHIO INDEPENDENT SCHOOLS, AMICI CURIAE

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## BRIEF OF 21 OHIO INDEPENDENT SCHOOLS, AMICI CURIAE

### INTEREST OF THE AMICI CURIAE

This Brief is submitted with the consent of counsel on behalf of the 21 Ohio independent, non-sectarian, non-profit schools listed in the Appendix hereto. All of these schools are engaged in primary and/or secondary education in the State of Ohio with a total enrollment of over 8,000 students who benefit from the provision of Ohio Revised Code Sec. 3317.06. All but three of the schools are members of the Ohio Association of Independent Schools and all are qualified as exempt organizations under Sec. 501(c)(3) of the Internal Revenue Code. The aid provided during the current biennium has been expended for stu-

dents in these independent schools principally on textbooks and auxiliary materials and equipment, relatively small amounts on medical and diagnostic services and very little on remedial services.

As applied to these non-sectarian schools, there should be no question as to the validity of the Ohio statute under the First and Fourteenth Amendments of the United States Constitution.

These independent schools file this Brief because of the importance of preserving an alternative to our public education system and of recognizing the right of the individual to have a viable alternative. It would be unfortunate if children are denied basic educational material as well as health and medical assistance merely because they attend non-public schools.

**I. The Furnishing of Textbooks and Instructional Materials and Equipment Are Not Violative of the Establishment Clause.**

The appellants in this case concede that the validity of loaning textbooks to children or parents of children in non-public schools has been properly laid to rest in *Board of Education v. Allen*, 392 U.S. 236 (1968) and in *Meek v. Pittenger*, 421 U.S. 349 (1975).

Like the dissenters in *Meek*, these *amici* find it "difficult to articulate any principal basis upon which to distinguish the textbook provision"[1] from the material and equipment provisions of the Ohio statute which permits the use of instructional materials and equipment only if they are "incapable of diversion to religious use." For the independent non-sectarian school, the instructional material and equipment cannot be diverted to religious use.

[1] *Meek v. Pittenger*, 421 U.S. 349, 391 (1975), (opinion of Rehnquist, J.).



This limitation plus the fact that they are loaned to students or parents overcome the objections set forth in the *Meek* case. In this day and age of modern electronic technology, can there be a valid constitutional distinction between a mathematics textbook and a calculator or between a foreign language textbook and a language tape? The three-judge District Court in this case said that it was

> ". . . unable to determine a substantive difference between textbooks on the one hand and maps, charts, models and collections on the other, except, possibly, the relative effectiveness of the latter in attracting the attention of a particular student and in educating him. In the view of this Court, however, the determination of pedagogical effectiveness is better left to educators than to the courts."[2]

**II. The Auxiliary Services Are Justified as General Welfare Services Which Do Not Offend the Establishment Clause.**

The auxiliary services, contemplated by the Ohio statute, are not integral to classroom education as such, but rather pertain to the general physical, mental and emotional fitness of each child. They are at the very most auxiliary and supplemental to the educational mission of the schools. The Ohio Legislature has chosen to provide these services to all students in the State and has selected the schools as the best means of reaching every young person.[3]

This Court has made it clear that a government may not deny a benefit, even a gratuitous one, to a person or class of persons on a basis that infringes his constitution-

[2] *Wolman v. Essex*, 417 F. Supp. 1113, 1119 (S. D. Ohio 1976).

[3] The Court in *Meek v. Pittinger*, 421 U.S. 349, 360, n.8, found the fact that the services for public school students are codified in one statute and the same services for non-public school students are codified in a second statute "is of no constitutional significance."

ally protected interests, including First Amendment interests. *Speiser v. Randall*, 357 U.S. 513 (1958). As the Court said in *Sherbert v. Verner*, 374 U.S. 398 (1963):

> "This holding but reaffirms a principle that we announced a decade and a half ago, namely that no state may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, non-believers, Presbyterians, or the members of any other faith, *because of their faith or lack of it*, from receiving the benefits of public welfare legislation.'"

More recently, this Court, in *Meek* reaffirmed "the authority of the Pennsylvania General Assembly to make free auxiliary services available to all students in the Commonwealth, including those who attend church-related schools."[4] Nevertheless, in *Meek* the Court struck down certain auxiliary services authorized by the Legislature on the ground that excessive entanglement would be required for the State to assure that the professional staff members providing such services do not advance the religious mission of the non-profit schools.

The Ohio Legislature, mindful of the errors found in *Meek*, drafted Section 3317.06 in order to avoid such entanglements. The legislation distinguishes diagnostic and health services from treatment services. Only the former are provided on the non-public school premises; the latter are provided only in public places.

This distinction is significant because it assures that there will not be public identification of the State with the religious purposes of the parochial schools. The so-called "auxiliary services" provided in Section 3317.06 are public welfare aid to individuals, which aid has sectarian content only when sectarian schools are vehicles for its distribution. The Court has never held such State aid to be

[4] 421 U.S. 349, 368, n.17.



impermissible. Indeed, *Everson*[5] and *Allen*[6] stand for the contrary.

### III. The Constitution Does Not Permit Discrimination Against Non-Public Education.

Non-public education, embracing as it does a wide spectrum of sectarian and non-sectarian schools, is a vital part of our national educational establishment. It is well to remember that when the First Amendment was adopted, there were no public school systems in the United States.[7] In fact, the public schools as we know them today were an outgrowth of the private school model. Consequently, it can hardly be held that the Founding Fathers intended the establishment clause to serve as a vehicle for the abolition of private schools, sectarian or otherwise.

It is generally acknowledged that the great strength of American education is its diversity. The non-public schools are of inestimable value because of the alternative options which they provide. Within the private sector itself, there is further diversity, as exemplified in the totally non-sectarian purposes of the schools represented in this brief, whose small institutional size and special purpose functions allow unique opportunities for academic excellence and responsible innovation.

If this Court should find that the Ohio statute in question has the indirect effect of aiding church-related schools by providing material and services to children, there is sufficient constitutional reason to permit this tangential aid. The schools are not mere conduits to the churches which stand behind them. Rather, the schools are impor-

[5] *Everson v. Board of Education*, 330 U.S. 1 (1947).

[6] *Board of Education v. Allen*, 392 U.S. 236 (1968).

[7] CORNELISON, THE RELATION OF RELIGION TO CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA, (1895).

tant segments of the community at large.[8] The need for pluralism in our society is a "competing interest" which must be weighed in the balance.

In striking the balance, these *amici* urge the Court to be mindful of the words of Mr. Justice Blackmun that:

> "A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required."[9]

[8] *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930); *Brown v. Board of Education*, 347 U.S. 483 (1954).

[9] *Roemer v. Maryland Public Works Board*, __ U.S. __, 49 L. Ed. 2d 179, 187 (1976) (Footnote omitted).



## CONCLUSION

The Ohio legislation has been carefully drawn to meet the guidelines set out by this Court. The purpose and effect of the statute is to aid children, not religion. The prohibited entanglements are not present. Any "indirect and incidental" benefit which the statute may afford sectarian schools should not defeat its constitutional validity.

For these reasons, and for the reasons developed by the Appellees in their briefs, these *amici* respectfully urge this Court to affirm the judgment of the District Court.

Respectfully submitted,

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March 28, 1977

# APPENDIX

| School | Head |
|---|---|
| Andrews School, Willoughby | Roberta M. Lee |
| Canton Country Day School, Canton | Thomas W. Keeley |
| Center City School, Dayton | Robert Hoover |
| Cincinnati Country Day School, Cincinnati | Charles F. Yeiser |
| The Columbus Academy, Columbus | William S. Putnam |
| Columbus School for Girls, Columbus | John V. Chapman |
| The Grand River Academy, Austinburg | Keith A. Johnson |
| Hathaway Brown School, Cleveland | Bancroft F. Greene |
| Hawken School, Cleveland | T. Douglas Stenberg |
| Lake Ridge Academy, North Ridgeville | Clay Noia |
| Laurel School, Cleveland | Daniel O.S. Jennings |
| Maumee Valley Country Day School, Toledo | Jerry C. Millhon |
| Metropolitan School, Columbus | F. James Donnellan |
| The Miami Valley School, Dayton | Robert E. Fatherley, Jr. |
| Old Trail School, Bath | Wilfred J. Hemmer |
| Phillips School of Lake Erie, Painesville | Margaret Bowers |
| Ridgewood School, Springfield | Herbert E. Distelhorst |
| The Seven Hills Schools, Cincinnati | Henry P. Briggs, Jr. |
| Sixpence School of Columbus, Columbus | Marvin E. Baker |
| University School, Cleveland | Rowland P. McKinley, Jr. |
| Western Reserve Academy, Hudson | Hunter M. Temple |